



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

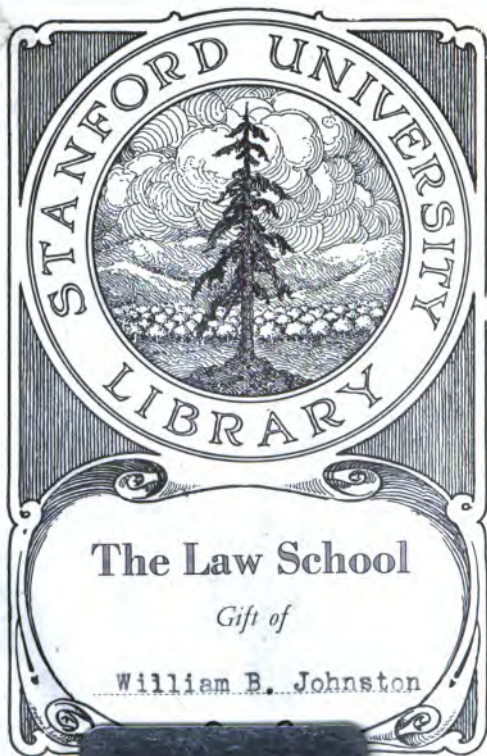
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

DIOSY & CO.
LAW BOOKS,
231 Broadway,
NEW YORK.



PLEADING

UNDER THE CODES

ADAPTED TO USE IN THE SEVERAL STATES AND TERRITORIES WHICH HAVE ADOPTED THE SYSTEM OF REFORMED PROCEDURE, AND IN ALL THE COURTS WHERE THAT SYSTEM PREVAILS.

BY

CHARLES T. BOONE, LL. B.

AUTHOR OF "LAW OF CORPORATIONS," "REAL PROPERTY," ETC.

SAN FRANCISCO:
SUMNER WHITNEY & CO.
1885.

L30225

AUG 9 1945

COPYRIGHT, 1885.
BY CHARLES T. BOONE.

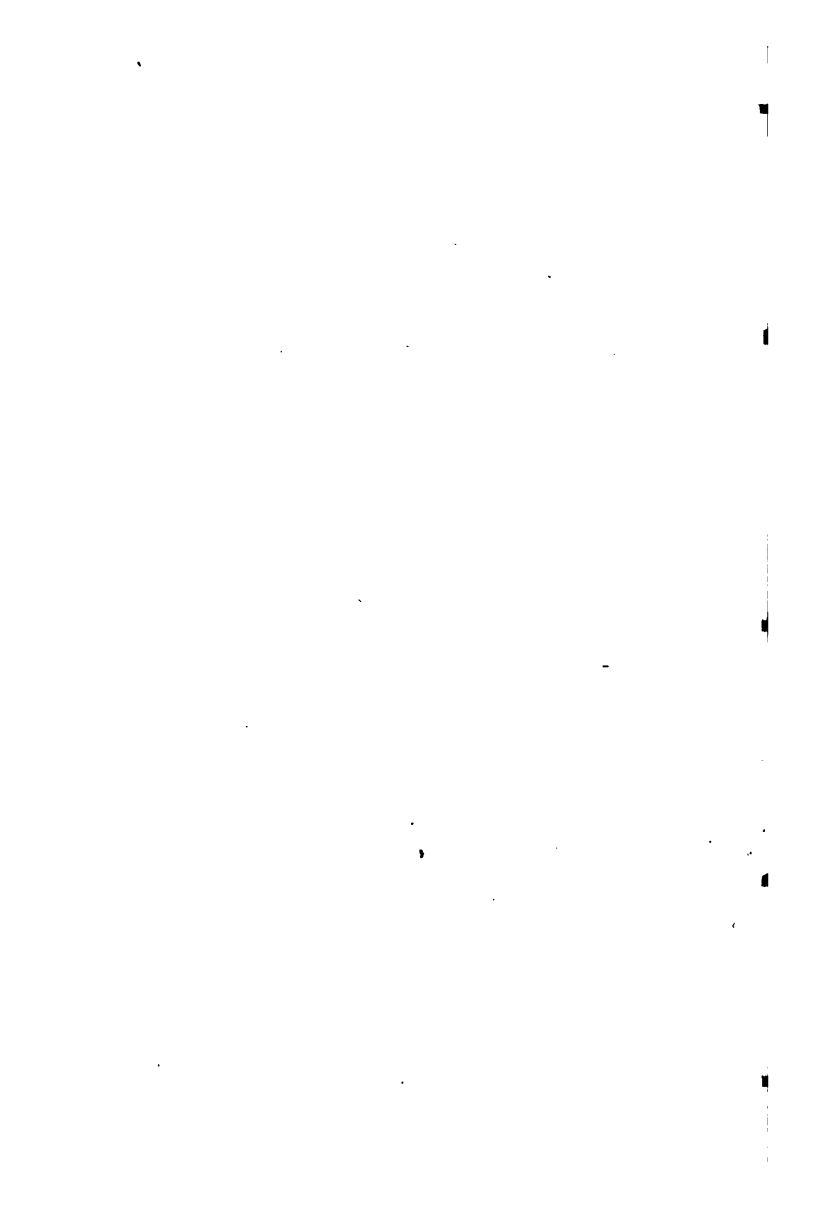
ABRU GROMATE

PREFACE.

SEVERAL excellent works explanatory of the theory of Code pleading are already in the hands of the profession. But it is believed that a work more practical in its character than any that has heretofore appeared upon the subject, embodying the requisites of good pleading under the new procedure, and adapted to use in all the Code States and Territories, will be heartily welcomed by the busy practitioner. Such a work has been attempted in the following pages. With a view to its practical usefulness, wherever the reformed procedure has been adopted, the decisions of the Code States and Territories bearing upon the subject of pleading have been carefully examined, and the result is here embodied in a form which is believed to be as convenient for use as the nature of the subject will permit. Especial pains have been taken to give the gist of all the later decisions upon the subject, and important statutory changes are also noted in connection with the decisions under the appropriate heads. Notwithstanding defects and imperfections which, perchance, may mar the work to some extent, it is offered to the profession in the confident belief that the test of actual use will insure it an abiding place in the office of the practicing attorney.

CHARLES T. BOONE.

SAN FRANCISCO, CAL., Aug. 26, 1885.



CONTENTS.

CHAPTER I.

NATURE OF PLEADING IN GENERAL.

- { 1. What is an action.
- { 2. Definition and object of pleading.
- { 3. Pleading at common law.
- { 4. Pleading in equity.
- { 5. General features of Code pleading.
- { 6. Parts of Code pleading.

CHAPTER II.

COMPLAINT OR PETITION.

- { 7. What to contain, in general.
- { 8. Caption — Place of trial.
- { 9. Caption — Names of parties.
- { 10. Statement of facts -- General rule.
- { 11. What should not be stated in.
- { 12. Matters judicially noticed.
- { 13. Allegations of time and place.
- { 14. Allegations of quantity or value.
- { 15. Facts to be stated positively.
- { 16. Facts to be stated concisely.
- { 17. Consistency in pleading required.
- { 18. Averment of damages.
- { 19. Averment of consideration.
- { 20. Allegation of fraud.
- { 21. Allegation of demand.
- { 22. Performance of conditions.
- { 23. Averment of notice.
- { 24. Averment of knowledge or *scienter*.
- { 25. Averment of title or ownership.
- { 26. Pleading contracts.

- § 27. Attaching copy of instrument as exhibit.
- § 28. Pleading instrument for payment of money.
- § 29. Pleading private statutes.
- § 30. Pleading a judgment.
- § 31. Averment of corporate existence.
- § 32. Averment of representative character.
- § 33. Demand of relief or judgment.
- § 34. Verification.
- § 35. Formal parts of.
- § 36. Separate counts or statements for a single cause of action.
- § 37. Joinder of causes of action.
- § 38. What constitutes a single cause of action.
- § 39. Choice of remedy.
- § 40. Supplemental, nature of.

CHAPTER III.

DEMURRER TO COMPLAINT OR PETITION.

- § 41. Nature of a demurrer in general.
- § 42. Effect of demurrer.
- § 43. Demurrer confined to face of complaint or petition.
- § 44. Objections must be specific.
- § 45. Effect of not demurring.
- § 46. Waiver or abandonment of demurrer.
- § 47. Want of jurisdiction.
- § 48. Want of capacity to sue.
- § 49. Another action pending.
- § 50. Misjoinder of parties.
- § 51. Defect of parties.
- § 52. Causes of action improperly united.
- § 53. No cause of action.
- § 54. Ambiguity, etc.
- § 55. Demurrer bad in part.
- § 56. When demurrer adjudged frivolous.
- § 57. Amendments after decision of demurrer.

CHAPTER IV.

THE ANSWER.

- § 58. Definition and nature of.
- § 59. What to contain, generally.

- § 60. Denials, general or specific.
- § 61. Denials must be direct and positive.
- § 62. Denying knowledge or information.
- § 63. What may or may not be denied.
- § 64. Effect of omission to deny.
- § 65. What may be shown under general denial.
- § 66. Pleading new matter in defense.
- § 67. Particular defenses — How interposed.
- § 68. Statute of frauds.
- § 69. Statute of Limitations.
- § 70. Pleading statutes generally.
- § 71. Consideration.
- § 72. Justification.
- § 73. Leave and license.
- § 74. Negligence.
- § 75. Denials of damages.
- § 76. Matter in aggravation.
- § 77. Partial defenses.
- § 78. Joinder of defenses.
- § 79. Joint answers.
- § 80. Each defense to be complete.
- § 81. Subscription — Verification.
- § 82. Verification, by whom and how made.
- § 83. Supplemental answer.

CHAPTER V.

COUNTER-CLAIM.

- § 84. Definition and nature of.
- § 85. Extent of, in general.
- § 86. As affected by parties to action.
- § 87. Construction.
- § 88. In action on contract.
- § 89. In cases of tort.
- § 90. In actions for services, etc.
- § 91. Assault and battery.
- § 92. In actions for divorce.
- § 93. In foreclosure cases.
- § 94. Between landlord and tenant.
- § 95. In action for goods sold.
- § 96. In actions relating to real property.
- § 97. In particular cases.
- § 98. In what cases not pleadable.

CONTENTS.

- § 99. Claims in different rights.
- § 100. Defendant not bound to set up.
- § 101. How pleaded.
- § 102. Cross-pleading.

CHAPTER VI.

REPLY.

- § 103. When necessary, in general.
- § 104. Form of.
- § 105. Departure.
- § 106. In particular cases.
- § 107. Waiver of.
- § 108. In cases not required.
- § 109. Grounds of demurrer to.

CHAPTER VII.

DEMURRER TO ANSWER.

- § 110. When it lies, in general.
- § 111. Form and sufficiency of.
- § 112. Sufficiency of prior pleadings considered on.
- § 113. One good defense.
- § 114. Where counter-claim is interposed.
- § 115. Instances of, sustained.
- § 116. When it will not lie.
- § 117. Effect of.
- § 118. As an admission of facts pleaded.

CHAPTER VIII.

PLEADING IN PARTICULAR CASES.

- § 119. Abandonment and forfeiture.
- § 120. Account—Account stated.
- § 121. Accounting.
- § 122. Agency.
- § 123. Bills and notes—Complaint.
- § 124. Bills and notes—Answer.
- § 125. Bill of particulars.

- § 126. Bill of particulars — Form, contents, etc.
- § 127. Bonds and undertakings — Complaint.
- § 128. Bonds and undertakings — Answer.
- § 129. Breach of promise to marry — Complaint.
- § 130. Breach of promise to marry — Answer.
- § 131. Civil Damage Act.
- § 132. Claim and delivery — Replevin.
- § 133. Common carrier.
- § 134. Conspiracy.
- § 135. Contracts.
- § 136. Conversion — Complaint.
- § 137. Conversion — Answer.
- § 138. Corporations — Complaint.
- § 139. Corporations — Answer.
- § 140. Damages.
- § 141. Divorce — Complaint.
- § 142. Divorce — Answer.
- § 143. Executors and administrators.
- § 144. Foreclosure — Complaint.
- § 145. Foreclosure — Answer.
- § 146. Forcible entry and detainer.
- § 147. Fraud — Complaint.
- § 148. Fraud — Answer.
- § 149. Fraudulent conveyances.
- § 150. Goods sold and delivered.
- § 151. Guaranty.
- § 152. Husband and wife.
- § 153. Injunction.
- § 154. Innkeeper.
- § 155. Insurance — Fire.
- § 156. Insurance — Life.
- § 157. Insurance — Marine.
- § 158. Insurance — Answer.
- § 159. Interpleader.
- § 159 a. Intervention.
- § 160. Judgments — Complaint.
- § 161. Judgments — Answer.
- § 162. Landlord and tenant.
- § 163. Libel and slander — Complaint.
- § 164. Libel and slander — Answer.
- § 165. Lien, mechanic's — Complaint.
- § 166. Lien, mechanic's — Answer.
- § 167. Malicious prosecution — Complaint.
- § 168. Malicious prosecution — Answer.
- § 168 a. Mandamus.

- § 169. Master and servant.
- § 170. Mistake.
- § 171. Money had and received, etc.
- § 172. Municipal corporations — Complaint.
- § 173. Municipal corporations — Answer.
- § 174. Negligence — Complaint.
- § 175. Negligence — Answer.
- § 176. Nuisance.
- § 177. Officers.
- § 178. Partition.
- § 179. Partnership — Complaint.
- § 180. Partnership — Answer.
- § 181. Penalties.
- § 182. Physician and surgeon.
- § 183. Pledge.
- § 184. Possession of land — Complaint.
- § 185. Possession of land — Answer.
- § 186. Quieting title — Complaint.
- § 187. Quieting title — Answer.
- § 188. *Quo warranto*.
- § 189. Railroads — Injury to animals.
- § 190. Receivers.
- § 191. Recognizance.
- § 192. Redemption.
- § 193. Reformation of instrument.
- § 194. Rescission and cancellation.
- § 195. Services — Complaint.
- § 196. Services — Answer.
- § 197. Services — Loss of.
- § 198. Sheriffs — Complaint.
- § 199. Sheriffs — Answer.
- § 200. Slander — Of title.
- § 201. Specific performance — Complaint.
- § 202. Specific performance — Answer.
- § 203. Subscriptions.
- § 204. Sureties — Complaint.
- § 205. Sureties — Answer.
- § 206. Taxes — Taxation.
- § 207. Trespass — Complaint.
- § 208. Trespass — Answer.
- § 209. Trusts.
- § 210. Vendor and purchaser.
- § 211. Waste.
- § 212. Wills.
- § 213. Written instrument.

CHAPTER IX.

VARIANCE.

- § 214. Nature of.
- § 215. When material.
- § 216. When not material.
- § 217. Failure of proof.
- § 218. Instances of immaterial variances.
- § 219. Instances of fatal variance or failure of proof.
- § 220. In matters of description.
- § 221. Allegation as to joint or several liability.
- § 222. Allegation of performance — Waiver.
- § 223. Between proof and bill of particulars.
- § 224. Between summons and complaint.

CHAPTER X.

AMENDMENTS.

- § 225. In general — Liberally allowed.
 - § 226. As of course.
 - § 227. Extent of, as of course.
 - § 228. Instances of, allowed as of course.
 - § 229. Effect of, as of course.
 - § 230. Made in bad faith — Remedy.
 - § 231. On motion before trial.
 - § 232. After demurrer.
 - § 233. At the trial.
 - § 234. After trial.
 - § 235. After remand of cause — On appeal.
 - § 236. When considered as made — Defects cured, etc.
 - § 237. Instances of, allowed — Generally.
 - § 238. By whom made.
 - § 239. Exercise of discretion in allowing.
 - § 240. How made.
 - § 241. Terms on allowing.
 - § 242. Effect of — Waiver — Practice, etc.
- BOONE PLEAD. — a.

CHAPTER XI.

FORMAL DEFECTS—REMEDIES.

- § 243. In general.
- § 244. Nature and extent of remedy by motion.
- § 245. Motion must point out deficiency.
- § 246. Motion to make definite and certain.
- § 247. Instances of motion to make more definite sustained.
- § 248. Motion to make more definite—When made.
- § 249. Irrelevant matter—Surplusage.
- § 250. Redundant and scandalous matter.
- § 251. Multifariousness, inconsistency, etc.
- § 252. Sham pleading—Remedy.
- § 253. Frivolous pleading—Remedy.
- § 254. When pleadings deemed frivolous.
- § 255. Misnomer.
- § 256. Striking pleading from files, generally.
- § 257. Lost pleadings.

CHAPTER XII.

WAIVER OF OBJECTIONS.

- § 258. In general.
- § 259. To jurisdiction of court.
- § 260. To filing of complaint.
- § 261. To want of subscription or verification.
- § 262. Want of capacity to sue.
- § 263. Defect of parties.
- § 264. Misjoinder of parties.
- § 265. Misjoinder of actions.
- § 266. Causes of action not separately stated and numbered.
- § 267. Another action pending.
- § 268. Omitting name.
- § 269. Uncertainty and indefiniteness.
- § 270. By pleading over.
- § 271. In particular cases.

CHAPTER XIII.

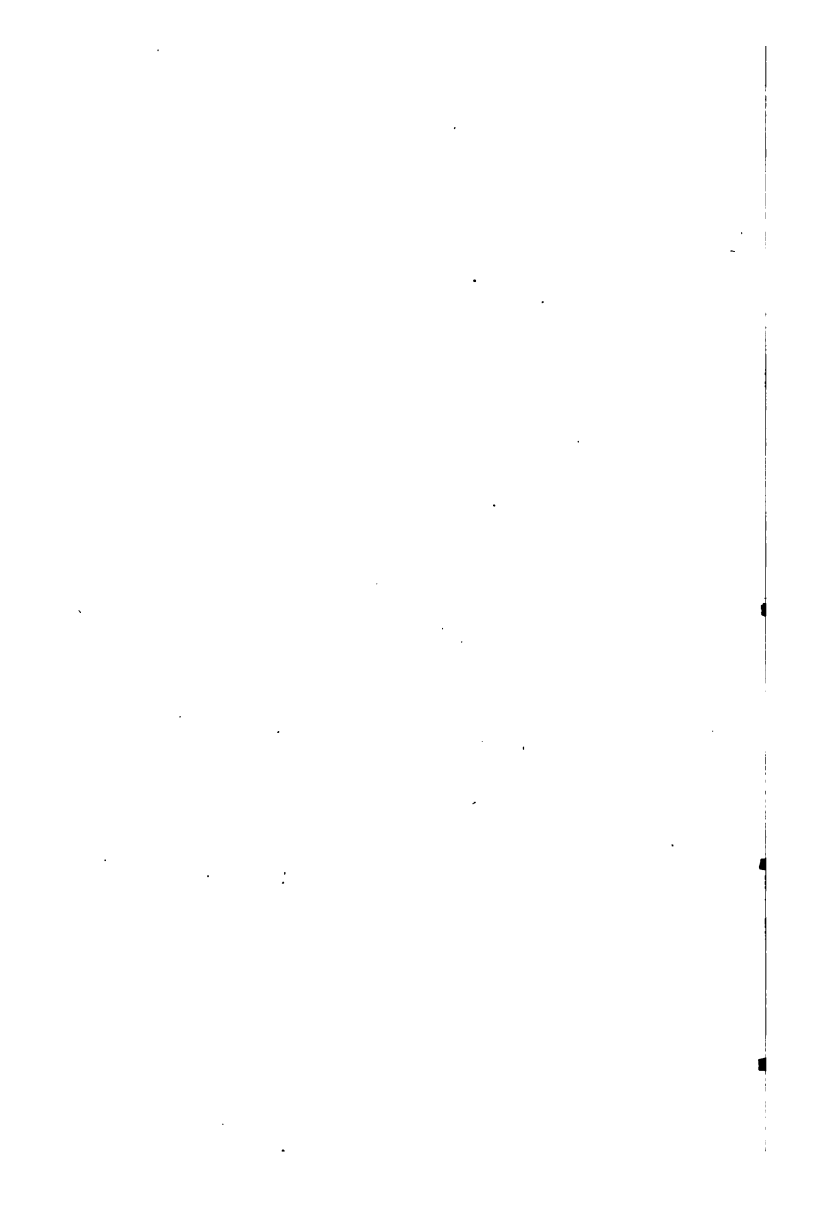
CONSTRUCTION OF PLEADINGS.

- § 272. In general.
- § 273. Presumptions.
- § 274. Ambiguity.
- § 275. Instances of construction unfavorable to pleader.
- § 276. General rules.
- § 277. Words and phrases.
- § 278. Abbreviations.
- § 279. Allegations as to time.
- § 280. Of admissions.

CHAPTER XIV.

CODE PLEADING IN FEDERAL COURTS.

- § 281. Statutory provision on subject.
- § 282. Complaint or petition.
- § 283. Form and sufficiency of answer.
- § 284. Defects and remedies.



PLEADING UNDER THE CODES.

CHAPTER I.

NATURE OF PLEADING IN GENERAL.

- § 1. What is an action.
- § 2. Definition and object of pleading.
- § 3. Pleading at common law.
- § 4. Pleading in equity.
- § 5. General features of Code pleading.
- § 6. Parts of Code pleading.

§ 1. **What is an action.**—An action, in the ordinary use of the term, is simply a legal demand of one's right.¹ It is usual, when speaking of a legal proceeding, to use the terms "action" and "suit" as synonymous, but the word "suit" is the more general term of the two, and in fact includes an "action."² An action is an abstract legal right in one person to prosecute another in a court of justice, and a suit is the actual prosecution of such right in a court of justice.³ According to the definition of Harris, J., any judicial proceeding which, if conducted to a termination will result in a judgment, is an action.⁴ As defined by the New York Code, "an action is an ordinary proceeding in a court of justice, by which a party prosecutes another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."⁵ The whole idea of

an action seems to include not only the act of a plaintiff who makes a lawful demand, and the act of a defendant in opposition, but also the act of a court in passing judgment between the parties.⁶ Civil actions are such as may be prosecuted for the enforcement or protection of private rights, or the redress or prevention of private wrongs.⁷

1 Co. Litt. 285; 3 Blackst. Com. 116; *Bridgton v. Bennett*, 23 Me. 425; *Overseers etc. v. Beedle*, 1 Barb. 11; *People v. Sage*, 3 How. Pr. 56; *Bank of Commerce v. Rutland etc.* R. R. Co. 10 How. Pr. 1, 9.

2 *People v. Colborne*, 20 How. Pr. 381. And see Co. Litt. 291 a; *Didler v. Davison*, 10 Paige, 517; *Matter of Hunter*, 6 Ohio, 499.

3 *Matter of Hunter*, 6 Ohio, 499.

4 *People v. County Judge etc.* 13 How. Pr. 400.

5 Code Civ. Proc. § 2. This definition has been adopted into the Codes of practice in many of the States: See Cal. Code Civ. Proc. § 22; N. C. Code Civ. Proc. § 2; *Tate v. Powe*, 64 N. C. 644; *Kramer v. Rebbman*, 9 Iowa, 114.

6 *People v. Colborne*, 20 How. Pr. 380.

7 Cal. Code Civ. Proc. §§ 22, 307.

§ 2. **Definition and object of pleading.**—The mutual altercations which constitute the *pleadings* in civil actions consist of those formal allegations and denials, which are offered on one side for the purpose of maintaining the suit, and on the other for the purpose of defeating it.¹ Or they are the written allegations of what is affirmed on the one side, or denied on the other, disclosing to the court or jury who have to try the cause the real matters in dispute between the parties.² Pleading is the formal mode of alleging that on the record which would be the support or defense of the party on evidence.³ Its office is to present the cause of action on one side, and a defense on the other, and this is true under every system of pleading.⁴ The principles of pleading, whatever the system, are always the same;⁵ and the grand object contemplated is the production of a certain and material issue between the parties which they refer to a trial, in order that justice

may be administered between them with regularity and certainty.⁶ And it was an observation of Chancellor Kent "that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought, consequently, to be very cautiously touched by the hand of innovation."⁷

1 Gould Plead. ch. 1, § 2; Burnham v. Ross, 47 Me. 453. And see Chitty Plead. 235; Cal. Code Civ. Proc. § 420.

2 Desnoyer v. Hereux, 1 Minn. 19.

3 Read v. Brookman, 3 Term Rep. 159.

4 Buddington v. Davis, 6 How. Pr. 401. And see Hotham v. East India Co. 1 Doug. 278; Rex v. Horne, Cowp. 632.

5 Buddington v. Davis, 6 How. Pr. 401. And see Kewaunee County v. Decker, 30 Wis. 624; Cooper v. Laudon, 102 Mass. 60; Parseley v. Nicholson, 65 N. C. 207; Oates v. Gray, 68 N. C. 442. But compare Moore v. Edmiston, 70 N. C. 510.

6 1 Chitty Plead. 235; Maguire v. Tyler, 47 Mo. 115; Pier v. Heinrichoffen, 52 Mo. 333; Lubert v. Chaviteau, 3 Cal. 453; 53 Am. Dec. 415; Parseley v. Nicholson, 65 N. C. 210.

7 Bayard v. Malcolm, 1 Johns. 453, 471. And see McFaul v. Ramsey, 20 How. 524, 525.

§ 3. **Pleading at common law.**—At common law, the pleadings in a civil action commence with the *declaration* or *count*, which is a statement, in legal form, of the facts constituting the plaintiff's cause of action.¹ The declaration is regularly succeeded by the defendant's *plea* or answer, which must be made within a reasonable time, or judgment will otherwise go against him by default.² The regular parts of the pleadings which follow are, the plaintiff's answer to the plea, called the *replication*, to which the defendant may put in an answer called a *rejoinder*; the plaintiff may answer the rejoinder by a *surrejoinder*, upon which the defendant may put in a *rebutter*, and the plaintiff may answer him by a *surrebutter*.³ A demurrer may be taken by either party, and to any part of the pleadings, until issue joined;⁴ and its office is to deny the legal sufficiency of the allegations demurred to.⁵ The order

of pleading is held to be a part of the common law, and does not depend upon a mere rule or rules of court.⁶ And the word "pleadings" includes the declaration as well as the plea filed.⁷ In pleading, facts only are to be stated, and not arguments, or inferences, or matter of law.⁸ And the certainty required is such a statement of the facts constituting the cause of action or defense as will enable them to be understood by the party who is to answer them, the jury who are to ascertain them, and by the court in pronouncing judgment.⁹ Immaterial averments may be disregarded as surplusage.¹⁰ Anciently, in England, pleadings were conducted orally by the respective parties, in open court, and the whole of the pleadings in a cause were termed the *parol*.¹¹ But at an early period all pleadings in a civil action were required to be in writing.¹²

1 Co. Litt. 17 a; 3 Blackst. Com. 293; 1 Chitty Plead. 264; Gould Plead. ch. 11, § 3.

2 3 Blackst. Com. 296; Gould Plead. ch. 11, § 5.

3 3 Blackst. Com. 310; 1 Chitty Plead. 263; Gould Plead. ch. 11, §§ 24, 28.

4 Co. Litt. 72 a; 3 Blackst. Com. 314. See Chamberlain v. Greenfield, 3 Wils. 292; Quarles v. Waldron, 20 Ala. 217.

5 3 Blackst. Com. 310; Gould Plead. ch. 9, § 4; Nowlan v. Geddes, 1 East, 634. And see Henderson v. Stringer, 6 Gratt. 130; Hobson v. McArthur, 3 McLean, 241; Roberts v. White, 3 Wis. 414.

6 Fenwick v. Grimes, 5 Cranch C. C. 603.

7 Burnham v. Ross, 47 Me. 458.

8 1 Chitty Plead. 236; Fuller v. Delevan, 20 Wend. 57; Goshen Turnp. Co. v. Sears, 7 Conn. 92; Clark v. Lineberger, 44 Ind. 223; Rex v. Horne, Cowp. 684.

9 Rex v. Horne, Cowp. 682; Bristow v. Wright, Doug. 666; Hester v. McNeillie, 6 Phila. 263; Posey v. Hair, 12 Ala. 567; Chapman v. Weaver, 19 Ala. 626; Adams v. Adams, 26 Ala. 272; Moore v. Smith, 19 Ala. 774; Carpenter v. Alexander, 9 Johns. 291; Murdock v. Caldwell, 8 Allen, 303; Prestidge v. Pendleton, 24 Miss. 80; Watling v. Ostler, Law R. 6 Ex. 73.

10 Grubb v. Mahoning Navigation Co. 14 Pa. St. 302; Bean v. Simpson, 16 Me. 49; Hall v. Spaulding, 42 N. H. 250; Hoyt v. Seeley, 18 Conn. 353; Wyman v. Fowler, 3 McLean, 467; Chapman v. Smith, 13 Johns. 80; Lyons v. Merrick, 105 Mass. 77; Wigley v. Jones, 5 East, 444.

11 3 Blackst. Com. 300; Gould Plead. ch. 1, § 1.

12 Gould Plead. ch. 1, § 1; 1 Spence Eq. Juris. 231, 232.

§ 4. **Pleading in equity.**— Courts of equity look to substance rather than to form, and rules of pleading in equity are not governed by the same technicality, as to matters of form, that control proceedings at common law.¹ But the substance of the rules is the same in each court, and the same strictness is required in equity pleading, as to matter of substance, as is required in pleading at common law.² Certainty in pleadings is required as well in equity as in law.³ So, pleadings in equity should consist of averments or allegations of fact, and not of inference or argument.⁴ The complainant's title should be stated with sufficient certainty and clearness to enable the court to see plainly that he has such a right as warrants its interference, and the defendant to be distinctly informed of the nature of the case which he is called upon to defend.⁵ Generally speaking, pleadings in equity consist of the formal, written allegations or statements of the respective parties on the record to maintain the suit, or to defeat it.⁶ The party seeking relief commences his suit by filing in the court a petition, called a bill in equity, setting forth the material facts of his case, and concluding with a prayer for the appropriate relief.⁷ The defendant may put in a demurrer to the whole or a part of the bill;⁸ he may, in a proper case, defend by way of plea,⁹ or may renounce all claim to the subject of the demand made by the bill, which mode of defense is known as a *disclaimer*.¹⁰ If he fails to protect himself in either of these modes, he must answer to the bill.¹¹ And as a general rule, where a defendant submits to answer, he must answer fully.¹² He is bound to give a full and sufficient disclosure to the questions put to him by the plaintiff's bill.¹³ The same degree of accuracy is not required to be observed in an answer as in a bill,¹⁴ and it can be excepted to for insufficiency only where some

material allegation, charge, or interrogatory in the bill is not fully answered.¹⁵ Bills in equity, excepting in a few instances, have always been in the English language;¹⁶ and a suit in equity was commonly termed a suit by English bill, in distinction from proceedings in suits at law, which were anciently entered in the French or Norman tongue, and afterwards in the Latin.¹⁷

1 Tiernan v. Poor, 1 Gill & J. 216; Birley v. Staley, 5 Gill & J. 432; Surget v. Byers, 1 Hemp. 715; Bolgiano v. Cooke, 19 Md. 375.

2 Daniels v. Toggart, 1 Gill & J. 311; Cockrell v. Gurley, 26 Ala. 405.

3 Prestidge v. Pendleton, 24 Miss. 80; Mewshaw v. Mewshaw, 2 Md. Ch. 14; Nesmith v. Calvert, 1 Wood. & M. 34; Cresset v. Mitton, 1 Ves. 449; 3 Brown Ch. 481; Duke of Brunswick v. King of Hanover, 6 Beav. 59; Whitaker v. Degraffeuried, 6 Ala. 303.

4 Welsman v. Heron etc. Co. 4 Jones Eq. 112; Chambers v. Chalmers, 4 Gill & J. 420.

5 Cockrell v. Gurley, 26 Ala. 405.

6 Story Eq. Plead. § 4, n.

7 Story Eq. Plead. § 7. And see Driver v. Fortner, 5 Port. 9; Harding v. Handy, 11 Wheat. 103; Webster v. Harris, 16 Ohio, 490; Danforth v. Smith, 23 Vt. 247; McConnell v. Gibson, 12 Ill. 123; Bailey v. Ryder, 10 N. Y. 363.

8 Smith v. Morehead, 6 Jones Eq. 360; Bull v. Bell, 4 Wis. 54; Vaughn v. Lovejoy, 34 Ala. 437; Norton v. Hixon, 25 Ill. 439; Melick v. Melick, 17 N. J. Eq. 156.

9 Saltus v. Tobias, 7 Johns. Ch. 214; Fremont v. Merced Min. Co. 1 McAll. 267; Chase v. McDonald, 7 Har. & J. 160; Union R. R. Co. v. East Tenn. etc. R. R. Co. 14 Ga. 327; Roche v. Morgell, 2 Schoales & L. 725.

10 Bently v. Cowman, 6 Gill & J. 152; Ellsworth v. Curtis, 10 Paige, 105.

11 Oliver v. Decatur, 4 Cranch C. C. 458; Story Eq. Plead. § 845; Bracken v. Kennedy, 4 Ill. 558. The defendant may demur as to a part, plead as to another part, and answer as to the rest of the bill; Story Eq. Plead. § 442; Livingston v. Story, 9 Peters, 632.

12 Warren v. Warren, 30 Vt. 530; Neale v. Hagthorp, 3 Bland, 125; Woods v. Morrell, 1 Johns. Ch. 103; Hill v. Cravy, 7 Ark. 536; Phillips v. Prevost, 4 Johns. Ch. 205; Lane v. Roche, Riley Ch. 215.

13 Rider v. Riely, 2 Md. Ch. 16; Moors v. Moors, 17 N. H. 481.

14 King v. King, 9 N. J. Eq. 44.

15 Stafford v. Brown, 4 Paige, 88.

16 Story Eq. Plead. § 7.

17 Mitf. & Tyler Eq. Plead. 105.

§ 5. General features of Code pleading.—Under Codes of procedure, which are now in force in a majority of the States and Territories, there is but one system of

rules respecting pleadings which govern all cases, both at law and in equity.¹ The forms of pleadings, and the rules by which their sufficiency is to be determined, are those prescribed in the Code itself.² The underlying principle of the system is, that material facts only, which constitute the cause of action, or the defense, must be stated.³ The dry allegations of the facts in the complaint or petition, without setting forth the evidence of the truth of the statements made, is all that is required.⁴ And any allegations which show with reasonable certainty the cause of action or ground of defense, will be sufficient without reference to conformity with or departure from the rules of pleading as recognized at common law.⁵ The Code system of pleading has been termed essentially a "fact system," which requires the parties in judicial proceedings to state the facts of their claims, and advise the opposite party of the true nature and object of the suit.⁶ The facts must be alleged so as to enable the opposite party to know what is meant to be proved, and also that an issue may be framed in regard to the subject-matter of dispute, and to enable the court to pronounce the law upon the facts stated.⁷ The main object of all good pleading is to arrive at a material, certain, and single issue;⁸ and it is claimed that the Code system best attains this object, in requiring the pleadings to contain a plain and concise statement of the facts constituting the cause of action or matter of defense.⁹ As it respects the manner of stating facts under the new system, the rules of equity are followed rather than those of the common law.¹⁰ But where the rule is supplied by the Code, no recourse should be had to either of the old systems of pleading.¹¹

1 See *Bowen v. Aubrey*, 22 Cal. 566; *Bitting v. Thaxton*, 71 N. C. 290; *White v. Lyons*, 42 Cal. 282; *Stevens v. Mayor etc.* 14 Jones & S. 274; 84 N. Y. 296; *Price v. Brown*, 10 Abb. N. C. 67; *Rindge v.*

Baker, 57 N. Y. 209; 15 Am. Rep. 475, 485; McDole v. Purdy, 23 Iowa, 277; Gillett v. Treganza, 13 Wis. 472; General Mut. Ins. Co. v. Benson, 5 Duer, 168; Wa Ching v. Constantine, 1 Idaho, 266.

2 Moore v. Edmiston, 70 N. C. 510; Trustees etc. v. Odlin, 8 Ohio St. 293; Ahern v. Collins, 39 Mo. 145, 150; Scott v. Robards, 67 Mo. 289.

3 Cowin v. Toole, 31 Iowa, 516; Horn v. Ludington, 28 Wis. 83; Cline v. Cline, 3 Oreg. 358; Green v. Palmer, 15 Cal. 414; Gates v. Salmon, 46 Cal. 379; Wright v. Wright, 59 Barb. 505; 54 N. Y. 437; Briggs v. Central Nat. Bank, 61 How. Pr. 250; McNabb v. Lockhart, 18 Ga. 495; Piffner v. Krapfel, 28 Iowa, 34.

4 Louisville etc. Canal Co. v. Murphy, 9 Bush, 527; Grant v. Bell, 87 N. C. 41; Brown v. Champlin, 66 N. Y. 214; Badeau v. Niles, 9 Abb. N. C. 48; Knowles v. Gee, 8 Barb. 300; Green v. Palmer, 15 Cal. 414. But the Code makes no change in the law which determines what facts constitute a cause of action, and does not authorize a recovery on a statement of facts which did not constitute a cause of action in some form before it was adopted: Hill v. Barrett, 14 Mon. B. 67; Frost v. Duncan, 19 Barb. 560; Cropsey v. Sweeney, 7 Abb. Pr. 129; 27 Barb. 310.

5 Holman v. Criswell, 15 Tex. 394; Trustees etc. v. Odlin, 8 Ohio St. 293; Moore v. Edmiston, 70 N. C. 510.

6 Piffner v. Krapfel, 28 Iowa, 34. And see Grant v. Bell, 87 N. C. 41; People v. Ryder, 12 N. Y. 437.

7 Louisville etc. Canal Co. v. Murphy, 9 Bush, 527.

8 § 2, ante; People v. Ryder, 12 N. Y. 437; Green v. Palmer, 15 Cal. 414.

9 See Pier v. Heinrichoffen, 52 Mo. 335, 336; Conaughty v. Nichols, 42 N. Y. 83; Boyce v. Brown, 3 How. Pr. 331; 7 Barb. 80; Green v. Palmer, 15 Cal. 411; Van Valen v. Lapham, 5 Duer, 630; St. John v. Pierce, 22 Barb. 362.

10 See 1 Wait's Pr. 291.

11 Trustees etc. v. Odlin, 8 Ohio St. 293; Moore v. Edmiston, 70 N. C. 510. The system of pleading in England has been completely changed by the judicature acts, but the same rules of pleading which prevailed under the old law prevail still, unless there is something in the judicature act or in the new orders or rules which prevents: Evans v. Buck, Law R. 4 Ch. Div. 432, 434.

§ 6. **Parts of Code pleading.**—It is now generally held that wherever the Code system of pleading has been adopted, all pre-existing forms of action and pleading have been thereby abolished;¹ and the only pleadings or parts of pleadings in civil actions and suits allowable under the Code system are, the complaint or petition by the plaintiff, the demurrer or answer by the defendant, and the demurrer or reply by the plaintiff.² Each of these parts will be separately considered in succeeding chapters.³

1 *White v. Joy*, 13 N. Y. 90; *Harper v. Harper*, 10 Bush, 449; *Trustees etc. v. Odlin*, 8 Ohio St. 233; *Dunn v. Remington*, 9 Neb. 82; *Moore v. Edmiston*, 70 N. C. 510; *Clark v. Bates*, 1 Dakota, 42. But compare *Parseley v. Nicholson*, 65 N. C. 207; *Sampson v. Shaeffer*, 3 Cal. 196; *Lubert v. Chaviteau*, 3 Cal. 458; 53 Am. Dec. 415; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 313.

2 *Stone v. Powell*, 13 Mon. B. 342; Cal. Code Civ. Proc. § 422.

3 Chapters 2-7, *post*.

CHAPTER II.

COMPLAINT OR PETITION.

- § 7. What to contain, in general.
- § 8. Caption — Place of trial.
- § 9. Caption — Names of parties.
- § 10. Statement of facts — General rule.
- § 11. What should not be stated in.
- § 12. Matters judicially noticed.
- § 13. Allegations of time and place.
- § 14. Allegations of quantity or value.
- § 15. Facts to be stated positively.
- § 16. Facts to be stated concisely.
- § 17. Consistency in pleading required.
- § 18. Averment of damages.
- § 19. Averment of consideration.
- § 20. Allegation of fraud.
- § 21. Allegation of demand.
- § 22. Performance of conditions.
- § 23. Averment of notice.
- § 24. Averment of knowledge or *scienter*.
- § 25. Averment of title or ownership.
- § 26. Pleading contracts.
- § 27. Attaching copy of instrument as exhibit.
- § 28. Pleading instrument for payment of money.
- § 29. Pleading private statutes.
- § 30. Pleading a judgment.
- § 31. Averment of corporate existence.
- § 32. Averment of representative character.
- § 33. Demand of relief or judgment.
- § 34. Verification.
- § 35. Formal parts of.
- § 36. Separate counts or statements for a single cause of action.
- § 37. Joinder of causes of action.
- § 38. What constitutes a single cause of action.
- § 39. Choice of remedy.
- § 40. Supplemental, nature of.

§ 7. What to contain, in general. — Under the Code system, the first pleading on the part of the plaintiff in an action is the complaint or petition,¹ which must

contain: (1) The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action; (2) a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition; (3) a demand of the relief which the plaintiff claims,¹ or a demand of the judgment to which the plaintiff supposes himself entitled.² The provisions of statute as to what the complaint or petition shall contain will be found to vary slightly in different States, but in the main they are substantially the same.⁴

1 See Cal. Code Civ. Proc. § 425; Dakota Code Civ. Proc. § 110; N. Y. Code Civ. Proc. § 478; N. C. Code Civ. Proc. § 92. Proceedings in civil suits in Texas have always been conducted by petition and answer: *Underwood v. Parrott*, 2 Tex. 163. A petition has taken the place of a common-law declaration in New Mexico: 1 New Mexico, 263. In Utah, the Code of Procedure applies to and governs all pleadings, modes, and forms, both at law and equity, and the first pleading in an action is the complaint: See *Houtz v. Gisborn*, 1 Utah, 173; *Zelle v. Moritz*, 1 Utah, 283.

2 Cal. Code Civ. Proc. § 428; N. Y. Code Civ. Proc. § 481; Ohio Code Civ. Proc. § 85; N. C. Code Civ. Proc. § 93; Dakota Code Civ. Proc. § 111; Florida Code Civ. Proc. § 93; *Wa Ching v. Constantine*, 1 Idaho, 268.

3 N. Y. Code Civ. Proc. § 481, subd. 3.

4 See Code of Iowa, § 2846.

§ 8. **Caption.—Place of trial.**—The caption is a part of the complaint or petition, and is to be regarded in construing it.¹ The place of trial must be clearly stated.² Where there is a good complaint it is immaterial what name is given to the action;³ but the name of the court in which the action is brought, and the name of the county in which the plaintiff desires the trial to be had, must be specified.⁴ If no court is named either in the summons or complaint it is a fatal objection to the pleading;⁵ though, if inserted in the summons it has been held that its omission in the complaint would be disregarded as a technical irregularity.⁶ The New York Code now provides that the complaint *must* contain the name of the court.⁷ So an omission of the

name of the county from the complaint is a defect which cannot be cured by being included in the summons,⁸ and the complaint in such case must be amended or stricken out as irregular.⁹

1 King v. Bell, 13 Neb. 409; McCloskey v. Strickland, 7 Iowa, 259.

2 Merrill v. Grinnell, 10 How. Pr. 31; Drury v. Mann, 4 Wls. 202, Budd v. Kramer, 14 Kan. 101.

3 Patterson v. State, 10 Ind. 296.

4 Hotchkiss v. Crocker, 15 How. Pr. 336; Leopold v. Poppenheimer, 1 Code R. 39; Davison v. Powell, 13 How. Pr. 237; Ammerman v. Crosby, 26 Ind. 451; Keabadour v. Weir, 20 Tex. 254; Eakins v. Groesbeck, 24 Tex. 179. The place of trial stated in the complaint determines where motions are to be made, as well as where the trial is to be had: Merrill v. Grinnell, 12 N. Y. Leg. Obs. 236; 10 How. Pr. 31.

5 Ward v. Stringham, 1 Code R. 118.

6 Van Namee v. People, 9 How. Pr. 198; Van Benthuyssen v. Stevens, 14 How. Pr. 70; Williams v. Sholts, 4 Sand. 644; Blackwell v. Montgomery, 1 Handy, 40; McLeran v. Morgan, 27 Ark. 148.

7 Code Civ. Proc. § 481, subd. 1.

8 Hotchkiss v. Crocker, 15 How. Pr. 336.

9 Hotchkiss v. Crocker, 15 How. Pr. 336; Merrill v. Grinnell, 12 N. Y. Leg. Obs. 236; 10 How. Pr. 31.

§ 9. **Caption—Names of parties.**—The complaint or petition must also contain the names of the parties to the action, plaintiff and defendant, and the names of *all* the parties should be included.¹ But if these names are correctly set forth in the title of the cause, it is unnecessary to repeat them;² as where, in the title of a cause, the individual names of partners are given, followed by the word "partners," the names need not be repeated in the body of the petition.³ The parties having been once named, it is sufficient in subsequent parts of the pleading to designate them as "the plaintiff" and "the defendant."⁴ If a defendant is known by two names, he may be sued by either,⁵ or by that by which he is generally known, though not his real one.⁶ And it is allowable to a plaintiff to designate a defendant by a fictitious name, when he is ignorant of the true name;⁷ but a description should be added, identifying the per-

son intended.⁸ "Junior" is no part of the name,⁹ nor are initials or "middle names" recognized in law.¹⁰ If the cause of action is in favor of the plaintiff in a representative character, or is against a defendant in a similar character, this fact should be clearly indicated, either in the caption or the body of the complaint or petition.¹¹ If it appears in the body of the pleading, it is sufficient though it does not appear in the title.¹² The representative capacity of the party suing or sued is designated by the use of the word "as," or its equivalent;¹³ and if the words denoting such capacity are added *directly* to the name of the party, they will be regarded as a mere *descriptio personæ*.¹⁴ But the mere omission of the word "as" is not conclusive, when the body of the complaint or petition plainly discloses an official or representative capacity as the ground of the action.¹⁵ Thus, where the plaintiff sued, adding after his name the words "executor," etc., but omitting the word "as," the court held that notwithstanding such omission, the frame and averments and scope of the complaint sufficiently clothed him with a representative character.¹⁶ But the rule is otherwise where the scope and averments of the complaint harmonize with such omission.¹⁷ And the body of the complaint should state the facts in an issuable form as to the representative capacity, if the suit is so intended, and it is not sufficient that such capacity is merely designated in the title of the complaint.¹⁸ But any form of averment clearly indicating the special character in which the plaintiff sues will be sufficient.¹⁹ And having once sufficiently set forth the character in which he sues, he may in all the subsequent parts of the pleading, refer to himself as "the said plaintiff," without adding his special character.²⁰ The State means the whole people united in one body politic, and "The State," and "The

People of the State," are equivalent expressions; ²¹ therefore, a complaint in the name of "The State of Colorado," for instance, is in effect a suit in the name of "The People of the State," and is good. ²²

1 Hill v. Thachter, 2 Code R. 3; 8 How. Pr. 407; Commonw. v. Hughes, 10 Mon. B. 160; Jackson v. Alexander, 8 Tex. 108; N. Y. Code Civ. Proc. § 481, subd. 1; Swift v. Smith, 4 Law Bull. (N. Y.) 87. Compare Smith v. Watson, 28 Iowa, 218.

2 Stanley v. Chappell, 8 Cowen, 235; King v. Bell, 13 Neb. 400.

3 King v. Bell, 13 Neb. 400. See Ammerman v. Crosby, 26 Ind. 451; Jaeger v. Hartman, 13 Minn. 55.

4 Stanley v. Chappell, 8 Cowen, 235; Davidson v. Savage, 6 Taunt. 121; Lowry v. Dutton, 28 Ind. 473; McLeran v. Morgan, 27 Ark. 148.

5 Eagleston v. Son, 5 Robt. 640.

6 Cooper v. Burr, 45 Barb. 0.

7 Crandall v. Beach, 7 How. Pr. 271; Frank v. Levie, 5 Robt. 599; Morgan v. Thrift, 2 Cal. 562; Gardner v. Kraft, 52 How. Pr. 499; Broadwell v. Kelly, 14 La An. 456.

8 N. Y. Code Civ. Proc. § 451. And there must be an allegation that the real name is unknown; Gardner v. Kraft, 52 How. Pr. 499.

9 People v. Cook, 14 Barb. 259; 8 N. Y. 67.

10 Van Voorhis v. Budd, 39 Barb. 479. And see Petition of John Snook, 2 Hill. 568; Gardner v. McClure, 6 Minn. 250; Wiebold v. Hermann, 2 Mont. 609.

11 Bowler v. Lane, 3 Met. (Ky.) 312; Smith v. Levinus, 8 N. Y. 472; Fowler v. Westervelt, 17 Abb. Pr. 59; 40 Barb. 374; Sheldon v. Hoy, 11 How. Pr. 11; Root v. Price, 22 How. Pr. 372.

12 Cordier v. Thompson, 8 Daly, 172. And see State v. Bartlett, 68 Mo. 581.

13 Stillwell v. Carpenter, 2 Abb. N. C. 238; 62 N. Y. 639; Bannon v. McGrang, 13 Jones & S. 517; Henshall v. Roberts, 5 East, 150.

14 Holton v. Parker, 13 Minn. 333; Hallett v. Harrower, 33 Barb. 537; Root v. Price, 22 How. 372; Smith v. Levinus, 8 N. Y. 472; Rupert v. Madden, 2 Pinn. 194; Magee v. Waupaca Co. 38 Wis. 247.

15 Beers v. Shannon, 73 N. Y. 292; Bennett v. Whitney, 94 N. Y. 302.

16 Beers v. Shannon, 73 N. Y. 292; rev'g 12 Hun, 161.

17 Bennett v. Whitney, 94 N. Y. 302.

18 Forrest v. Mayor etc. 13 Abb. Pr. 350; Gould v. Glass, 19 Barb. 179; Headlee v. Cloud, 51 Mo. 301; Mills v. Ralston, 10 Kan. 206; Scranton v. Farmers etc. Bank, 33 Barb. 527; 24 N. Y. 424; Wells v. Webster, 9 How. Pr. 251; Freeman v. Fulton Fire Ins. Co. 38 Barb. 247; 14 Abb. Pr. 398; Patterson v. Copeland, 52 How. Pr. 460; Bischoff v. Blease, 20 S. C. 460.

19 Scranton v. Farmers' etc. Bank, 33 Barb. 527; 24 N. Y. 424. And see Coope v. Bowles, 42 Barb. 87; 28 How. Pr. 10; 18 Abb. Pr. 442; Platt v. Crawford, 8 Abb. Pr. N. S. 297; Rockwell v. Merwin, 45 N. Y. 166; Phelps v. Platt, 50 Barb. 430; Manly v. Rasaiga, 13 Hun, 238.

20 Stanley v. Chappell, 8 Cowen, 235.

21 Penhollow v. Doane, 3 Dall. 93; Texas v. White, 7 Wall. 720.

22 Brown v. The State, 5 Colo. 498.

§ 10. **Statement of facts—General rule.**—The complaint or petition must contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition.¹ And by the words “facts constituting a cause of action,” are meant those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the facts.² And every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, should be distinctly averred and set forth.³ It is not, however, necessary that the facts should be stated according to their legal effect and operation,⁴ though they may be so stated, provided the conclusions of law are substantially correct.⁵ It is enough for the pleader to set forth facts as they exist, from which the court may draw the proper legal conclusions;⁶ and he may not aver a legal conclusion as an equivalent for the group of separate facts from which it is inferred.⁷ The facts required to be set forth are “physical facts,”⁸ and they should be so set forth as to permit a distinct traverse, and evolve a definite issue.⁹ Fictions are never allowed to be pleaded under the Code system.¹⁰ But where, from facts stated in the complaint, a material fact not stated in it is plainly inferable, the complaint ought not to be dismissed at the trial for insufficiency.¹¹ If facts are pleaded from which an ultimate fact necessarily results, it is the same as though such ultimate fact were specifically pleaded.¹² The very object of the new system of pleading is to enable the court to give judgment according to the facts stated and proved, without reference to the form used, or to the legal conclusion adopted by the pleader.¹³ If facts are stated in the complaint which are unnecessary to be proved to constitute a cause of action, they may be disregarded upon the trial.¹⁴

1 *§ 7, ante*; *Weidner v. Rankin*, 26 Ohio St. 522. And see *Warner v. Capps*, 37 Ark. 32; *Farnsworth v. Holderman*, 3 Utah, 381.

2 *Wooden v. Strew*, 10 How. Pr. 48; *Dunning v. Thomas*, 11 How. Pr. 281; *Zimmerman v. Morrow*, 28 Minn. 367; *Clay County v. Simonson*, 1 Dakota, 403; *O'Donohue v. Hendrix*, 13 Neb. 253; *People v. Ryder*, 12 N. Y. 433; *Hyatt v. McMahon*, 25 Barb. 457. But this rule does not apply in an action in which all the facts to be stated and the evidence of them are synonymous: *Davenport etc. Manuf. Co. v. Taussig*, 5 N. Y. Civ. Proc. R. 69, 74.

3 *Clay County v. Simonson*, 1 Dakota, 403; *Allen v. Patterson*, 7 N. Y. 476; *Prindle v. Caruthers*, 15 N. Y. 425; *Brown v. Harmon*, 21 Barb. 508; *McKyring v. Bull*, 16 N. Y. 297; *McNab v. Lockhart*, 18 Ga. 495; *Griggs v. St. Paul*, 9 Minn. 246; *Gray v. Osborne*, 24 Tex. 157; *Biddle v. Boyce*, 13 Mo. 532.

4 *Union Bank v. Bush*, 36 N. Y. 631; *Barney v. Worthington*, 37 N. Y. 116; 4 Abb. Pr. N. S. 205; *Cady v. Allen*, 23 Barb. 388; *Milburn v. Walker*, 11 Tex. 329. But see *Stewart v. Travis*, 10 How. Pr. 148; *Boyce v. Brown*, 7 Barb. 80; *Clay County v. Simonson*, 1 Dakota, 403.

5 *Bennett v. Jadsen*, 21 N. Y. 238; *Gasper v. Adams*, 28 Barb. 411. And see *Randolph v. Sharpe*, 42 Ala. 263.

6 *Cropsey v. Sweeney*, 27 Barb. 310; 7 Abb. Pr. 129; *Haight v. Child*, 34 Barb. 186; *Page v. Freeman*, 19 Mo. 421.

7 *Cook v. Warren*, 88 N. Y. 37; 14 Week. Dig. 50.

8 *Lawrence v. Wright*, 2 Duer, 673. And see *Drake v. Cockraft*, 10 How. Pr. 377; 1 Abb. Pr. 203; 4 Smith, E. D. 34.

9 *Cook v. Warren*, 88 N. Y. 37; *Mann v. Morewood*, 5 Sand. 557; *Miles v. McDermott*, 31 Cal. 271. And see *Murrell v. McAllister*, 79 Ky. 315; *Tye v. Catching*, 78 Ky. 463.

10 *Dunning v. Thomas*, 11 How. Pr. 281; *Bush v. Prosser*, 11 N. Y. 352; *Lackey v. Vanderbilt*, 10 How. Pr. 153.

11 *Leon v. Bernhelmer*, 10 N. Y. Week. Dig. 233; 10 Reporter, 610.

12 *Osborne v. Clark*, 60 Cal. 622.

13 *Wright v. Hooker*, 10 N. Y. 53. And see *Goff v. Edgerton*, 19 Abb. Pr. 381; *Olcott v. Carroll*, 39 N. Y. 4-6; *Conaughty v. Nichols*, 42 N. Y. 83.

14 *Bedell v. Callil*, 33 N. Y. 581. And see *State v. Williams*, 19 S. C. 62.

§ 11. What should not be stated in.—Generally speaking, the complaint should not state the evidence of facts, nor arguments, nor inferences, nor matters of law only.¹ The pleader must state the facts of his case by averment direct and positive, and not leave them to be deduced by argument and inference.² Facts should never be alleged in a hypothetical or alternative form when it is within the power of the pleader to give a plain and direct statement.³ If bare conclusions of law only are set forth the pleading is fatally defective, if objections are properly raised by the adverse party.⁴

And an allegation of a legal conclusion merely is one which gives no facts, but matter of law only.⁵ Such, for instance, as an allegation that a party is or is not "entitled" to a thing;⁶ or that it was or is the duty of a party to do or to forbear an act;⁷ or that a party failed to fulfill his obligations;⁸ or that a certain act was "illegal";⁹ or contrary to statute;¹⁰ or that a contract is void for want of a sufficient and adequate consideration;¹¹ or that a party is "indebted";¹² or an allegation as to what is a man's duty under a given state of circumstances.¹³ But an allegation that title is derived "by gift" is held to be an allegation of fact and not a conclusion of law;¹⁴ so of an allegation that a party is of unsound mind;¹⁵ and allegations in a complaint in an action for breach of covenant of seisin, that the defendant was not the true owner, and was not seized of the premises in fee, are allegations of matters of fact.¹⁶ The complaint need not contain allegations of facts not necessary to be proved on the trial.¹⁷ A fact necessarily understood or implied need not be alleged;¹⁸ thus, an averment that a deed was "executed" implies delivery and acceptance, and no delivery need be averred in terms.¹⁹ So, if a pleading alleges that a party executed an instrument, and sets out the instrument in full, it is equivalent to alleging that he made all the covenants and promises contained in such instrument, and assumed all the liabilities created thereby.²⁰ An allegation of possession implies a lawful title.²¹ As applied to commercial paper, the words "indorsed to" and the word "made" are held to import delivery.²² So, the words "duly assigned" import delivery and acceptance.²³ As a general rule, the complaint or petition ought not to anticipate or negative a possible defense of the adverse party;²⁴ as for instance, by allegations of facts or circumstances

seeking to avoid the Statute of Limitations.²⁵ And mere presumptions of law need not be stated, and their omission is no legal objection to the pleading.²⁶ Thus, in pleading a judgment, it is not necessary to allege that it still remains in full force, etc., because, when rendered, it is presumed to remain in force until the contrary appears.²⁷

1 *Kansas Pac. Railw. Co. v. McCormick*, 20 Kan. 107; *Clark v. Chicago etc. R. R. Co.* 28 Minn. 69; *Butler v. Viele*, 44 Barb. 166; *Lewis v. Kendall*, 6 How. Pr. 59; *Clay County v. Simonsen*, 1 Dakota, 403; *Hall v. Williams*, 13 Minn. 260; *Badeau v. Niles*, 9 Abb. N. C. 43; *Hilsen v. Libby*, 12 Jones & S. 12. And see *Lipe v. Becker*, 1 Denio, 563; *Bean v. Ayers*, 67 Me. 482; *Garner v. McCullough*, 48 Mo. 318; *Hall v. Harris*, 61 Iowa, 500.

2 *Truscott v. Dole*, 7 How. Pr. 221; *Nash v. City of St. Paul*, 8 Minn. 172; *Thompson v. Munger*, 15 Tex. 523; *Van Valen v. Lapham*, 5 Duer, 689; *Buzzard v. Knapp*, 12 How. Pr. 504.

3 *Stone v. Graves*, 8 Mo. 148; *Wies v. Fanning*, 9 How. Pr. 543; *Dovan v. Dinsmore*, 20 How. Pr. 503; 33 Barb. 86; *Zeldier v. Johnson*, 38 Wis. 335.

4 *Ramsey v. Erie R. R. Co.* 38 How. Pr. 193; 7 Abb. Pr. N. S. 156; *Van Schaick v. Winne*, 16 Barb. 89; *Campbell v. Taylor*, 2 West C. Rep. 541; *Larimore v. Wells*, 29 Ohio St. 13; *Dial v. Tappan*, 20 S. C. 167, 176; *State v. Hudson*, 13 Mo. App. 61; *Garner v. McCullough*, 48 Mo. 318; *Simpson v. Prather*, 5 Oreg. 86; *Tatum v. Tatum*, 19 Ark. 194; *Randall v. Shropshire*, 4 Met. (Ky.) 327; *Hershfield v. Aiken*, 3 Mont. 442; *Taylor v. Blake*, 11 Minn. 255. The failure to deny a conclusion of law is not an admission of it; *Larue v. Hays*, 7 Bush, 50; *Balt. & Ohio R. R. Co. v. Wilson*, 31 Ohio St. 555.

5 *Hatch v. Peet*, 23 Barb. 575.

6 *Drake v. Cockroft*, 10 How. Pr. 377; 4 Smith, E. D. 34; 1 Abb. Pr. 203. And see *Poorman v. Mills*, 35 Cal. 118; *Curtis v. Cutler*, 7 Neb. 315; *Sheridan v. Jackson*, 72 N. Y. 170; *Parks v. Barkley*, 1 Mont. 514; *Downer v. Read*, 17 Minn. 493; *Saunders v. Chamberlain*, 13 Hun, 568.

7 *City of Buffalo v. Holloway*, 7 N. Y. 493; 14 Barb. 101; *Balt. & Ohio R. R. Co. v. Wilson*, 31 Ohio St. 555; *Rolling Stock Co. v. Atlantic etc. R. R. Co.* 34 Ohio St. 467.

8 *Wilson v. Clarke*, 20 Minn. 367; *Van Schaick v. Winne*, 16 Barb. 95.

9 *Ransford v. Copeland*, 6 Ad. & E. 482; *People v. Lothrop*, 3 Colo. 428. And see *Ex parte Deny*, 10 Nev. 212.

10 *Smith v. Lockwood*, 13 Barb. 209. And see *People v. McCumber*, 15 How. Pr. 186; 27 Barb. 632.

11 *Hammond v. Earle*, 58 How. Pr. 426.

12 *Merritt v. Millard*, 5 Bosw. 645; *Fraser v. Williams*, 15 Minn. 294; *Roberts v. Treadwell*, 50 Cal. 520; *Holgate v. Broome*, 8 Minn. 243. And a simple denial of indebtedness is a mere conclusion of law; *Skinker v. Clute*, 9 Nev. 342; *Gilmore v. Taylor*, 5 Oreg. 86. And see *Larimore v. Wells*, 29 Ohio St. 13; *Rolling Stock Co. v. Atlantic etc. R. R. Co.* 34 Ohio St. 467.

13 *McLaughlin v. Campbell*, 14 N. Y. Week. Dig. 134. And see *Rex v. Everett*, 8 Barn. & C. 114.

14 *McCarty v. Tarr*, 83 Ind. 444.

15 *Riggs v. Am. Tract Soc.* 84 N. Y. 330; *Gharky's Estate*, 57 Cal. 274.

16 *Woolley v. Newcombe*, 58 How. Pr. 480; 87 N. Y. 605. That the plaintiff is the owner of certain lands is not a conclusion of law: *Commissioners etc. v. Young*, 18 Kan. 445; *Railroad Co. v. Leahy*, 12 Kan. 124. See *Berney v. Drexel*, 63 How. Pr. 476.

17 *Sanders v. Leavy*, 16 How. Pr. 303; *Decker v. Matthews*, 12 N. Y. 320; *Gould v. Williams*, 9 How. Pr. 51; *Dias v. Short*, 16 How. Pr. 322.

18 *Partridge v. Badger*, 25 Barb. 170; *Hunt v. Bennett*, 19 N. Y. 173; *Allen v. Watson*, 16 Johns. 205; *Clark v. Phillips*, Hemp. 294; *Malcolm v. O'Reilly*, 89 N. Y. 156.

19 *Thorp v. Keokuk Coal Co.* 48 N. Y. 253.

20 *Budd v. Kramer*, 14 Kan. 101.

21 *Sheldon v. Hoy*, 11 How. Pr. 11.

22 *Prindle v. Caruthers*, 15 N. Y. 425; *La Fayette Ins. Co. v. Rogers*, 30 Barb. 491.

23 *Hoag v. Mendenhall*, 19 Minn. 335; *Ragland v. Wood*, 71 Ala. 145. And see *Bank of Lowville v. Edwards*, 11 How. Pr. 216; *Griswold v. Laverty*, 3 Duer, 691. It is unnecessary to allege a promise where, from the facts stated, a promise may be implied: *Dows v. Hotchkiss*, 10 N. Y. Leg. Obs. 281; *Cropsey v. Sweeney*, 7 Abb. Pr. 129; 27 Barb. 310.

24 *Sands v. St. John*, 23 How. Pr. 140; 36 Barb. 623; *Miller v. Fisher*, 1 Ariz. 232; *Merwin v. Hamilton*, 6 Duer, 248; *Canfield v. Tobias*, 21 Cal. 349. See *Bracket v. Wilkinson*, 13 How. Pr. 102.

25 *Sands v. St. John*, 23 How. Pr. 140; 36 Barb. 623; *Moulton v. Walsh*, 30 Iowa, 381; *Huston v. Craighead*, 23 Ohio St. 198. And see *Livingston v. Smith*, 14 How. Pr. 490; *McDonald v. Mission View Homestead Assoc.* 51 Cal. 210; *Bonham v. Craig*, 80 N. C. 224.

26 *Chautauque County Bank v. Risley*, 19 N. Y. 381; *Hunt v. Bennett*, 19 N. Y. 173; *Irvine v. Irvine*, 5 Minn. 61; *Bolton v. Cleveland*, 35 Ohio St. 319; *Jaeger v. Hartman*, 13 Minn. 55; *Fry v. Bennett*, 28 N. Y. 324.

27 *Campbell v. Cross*, 39 Ind. 155.

§ 12. *Matters judicially noticed.*—A fact which is judicially known to the court is to be regarded as a matter of law, and should not therefore be alleged.¹ Thus, the public laws of a State or of the United States are judicially noticed and need not be pleaded;² so of matters of public history of the country;³ so of the prominent geographical features of a State or of the country;⁴ treaties and proclamations;⁵ matters of science or art;⁶ seals of foreign States;⁷ public officers;⁸ terms of courts.⁹ So, a court will judicially notice its own

records,¹⁰ its officers and their signatures;¹¹ but not the signatures of parties.¹² Nor will courts judicially notice the law of another State or country, and it must be pleaded as a matter of fact.¹³ So the ordinances of a municipal corporation must be set forth;¹⁴ so must private statutes and the laws and customs of religious bodies,¹⁵ the usages of trade established by a particular board,¹⁶ or the customs of mining districts.¹⁷ And the existence of a city of a specified name in another State will not be judicially noticed, and must be set forth.¹⁸ Nor does it seem that the court is bound to take judicial notice of the population of a city by any particular census.¹⁹

1 *Cooke v. Tallman*, 40 Iowa, 153.

2 *Haight v. Child*, 34 Barb. 136; *Swinerton v. Columbian Ins. Co.* 37 N. Y. 174; *Hewett v. Harvey*, 46 Mo. 383; *Brown v. State*, 11 Ohio, 278; *Brown v. Harmon*, 21 Barb. 503; *Platt v. Crawford*, 8 Abb. Pr. N. S. 297; *Morris v. Davidson*, 49 Ga. 361; *Bagly v. Chubb*, 16 Gratt. 284; *Butler v. Robinson*, 75 Mo. 192.

3 *Swinerton v. Columbian Ins. Co.* 37 N. Y. 174; *Payne v. Treadwell*, 16 Cal. 220; *Rice v. Shook*, 27 Ark. 137; *Smith v. Stevens*, 82 Ill. 551; *Howard v. Moot*, 64 N. Y. 262; *Simmons v. Trumbo*, 9 W. Va. 353; *Williams v. State*, 67 Ga. 260.

4 *Hinckley v. Beckwith*, 23 Wis. 328; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *People v. Snyder*, 41 N. Y. 397; *Wright v. Hawkins*, 28 Tex. 452; *Gilbert v. Molnie*, 19 Iowa, 319.

5 *Lacroix v. Sarrazin*, 15 Fed. Rep. 489; *United States v. Reynes*, 9 How. 127; *Dole v. Wilson*, 16 Minn. 525; *Dunning v. New Albany etc. R. R. Co.* 2 Ind. 437; *Perkins v. Rogers*, 35 Ind. 124; 9 Am. Rep. 639. And see *Hill v. Baker*, 32 Iowa, 302; 7 Am. Rep. 133.

6 *Luke v. Calhoun Co.* 52 Ala. 115; *Adler v. State*, 55 Ala. 16; *State v. Goyette*, 11 R. I. 532; *Brown v. Piper*, 91 U. S. 37; *People v. Chee Kee*, 61 Cal. 401; *Clough v. Goggins*, 40 Iowa, 325; *Brillitt v. State*, 58 Wis. 39; 46 Am. Rep. 631.

7 *Lazier v. Westcott*, 26 N. Y. 146; *Lincoln v. Battelle*, 6 Wend. 475; *Staublein v. State*, 17 Ohio St. 463. And see *Pierce v. Indseth*, 106 U. S. 546.

8 *State v. Williams*, 5 Wis. 308; *Ragland v. Wynn*, 37 Ala. 32; *Dewees v. Colorado Co.* 32 Tex. 570.

9 *Davidson v. Petiecolas*, 34 Tex. 27; *Spencer v. Curtis*, 57 Ind. 221; *Kilpatrick v. Commonwealth*, 31 Pa. St. 193; *Rodgers v. State*, 50 Ala. 102.

10 *State v. Hoeflinger*, 35 Wis. 393; *State v. Bowen*, 16 Kan. 475; *Robinson v. Brown*, 82 Ill. 279; *State v. Schilling*, 14 Iowa, 455.

11 *Mackinnon v. Barnes*, 66 Barb. 91; *Masterson v. Le Claire*, 4 Minn. 161; *Norvell v. McHenry*, 1 Mich. 227. And see *Himmelmann v. Hoadley*, 44 Cal. 213.

12 *Alderson v. Bell*, 9 Cal. 315.

13 *Evans v. Reynolds*, 32 Ohio St. 163; *Hoyt v. McNeill*, 13 Minn. 390; *Ellis v. Maxson*, 19 Mich. 186; 2 Am. Rep. 81; *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631; *Roots v. Merriwether*, 8 Bush, 337.

14 *Harker v. Mayor etc.* 17 Wend. 199; *Garvin v. Wells*, 8 Iowa, 296; *Porter v. Waring*, 60 N. Y. 250; *Lucker v. Commonw.* 4 Bush, 440; *Winona v. Burke*, 23 Minn. 254. But acts creating municipal corporations are public acts, of which courts will take judicial notice: *Prell v. McDonald*, 7 Kan. 420; 12 Am. Rep. 423; *City Council v. Wright*, 72 Ala. 411.

15 *Timlow v. Phila. etc. R. R. Co.* 90 Pa. St. 234; *First Nat. Bank v. Gruber*, 87 Pa. St. 463; 30 Am. Rep. 373; *Railroad Co. v. Moore*, 23 Ohio St. 334; *Youngs v. Ransom*, 31 Barb. 47. Courts will take judicial notice of a railroad charter, published with other legislative enactments: *Hall v. Brown*, 58 N. H. 93. And see *Webb v. Bidwell*, 15 Minn. 479.

16 *Goldsmith v. Sawyer*, 46 Cal. 209. That courts should take judicial notice of the manner in which business is done: *Mich. etc. R. R. Co. v. McDonough*, 21 Mich. 163; 4 Am. Rep. 466, 473.

17 *Sullivan v. Hense*, 2 Colo. 424.

18 *Whitlock v. Castro*, 22 Tex. 109; *Riggin v. Collier*, 6 Mo. 563. Courts do not take judicial notice of the fact that a certain town is in a certain county: *Clayton v. May*, 67 Ga. 789; and see *Boston v. State*, 5 Tex. Ct. App. 383; 33 Am. Rep. 575; unless the fact is recognized in a general statute: *Hoffman v. State*, 12 Tex. Ct. App. 404. The courts will take judicial notice of the relation of the streets of San Francisco to one another, and of the directions in which they run: *Brady v. Page*, 59 Cal. 52.

19 *Bolton v. Cleveland*, 35 Ohio St. 313. But compare *Stultz v. State*, 65 Ind. 492.

§ 13. *Allegations of time and place.*—If the time when a fact happened is material to constitute the cause of action, it should be stated.¹ But, except in describing a written instrument bearing a written date,² or as a condition precedent to a right of action,³ averments of time cannot in general be held material.⁴ Where time is material and essential to the cause of action, and is necessarily within the plaintiff's knowledge, it must be alleged positively and with precision, and "on or about" a particular day is not sufficient.⁵ And the occurrence of a fact at a particular time, if material, will not be presumed in favor of the pleader in the absence of a proper allegation in the pleading.⁶ But if the only materiality of a question of time is to show that a particular fact occurred after some other event,

it is usually sufficient to allege that such fact so occurred, without giving the precise date.⁷ Allegations of time must be construed to refer to the time of the commencement of the action, whether in form in the present or past tense, when not otherwise stated.⁸ As it respects allegations of place, the general rule is, if the matters pleaded are local in their nature, the allegation of place is material and of the substance of the issue.⁹ If one contracts to sell and deliver at a particular place, and another agrees to receive and pay, an averment by the purchaser of a readiness and willingness to receive and pay *at that place* is essential to a good complaint in an action for non-delivery.¹⁰ If a party seeks to enforce a contract which is void by the laws of the State, he must aver and prove *where* it was made, and that by the laws of that place it was authorized and valid.¹¹ When a right of action, unknown to the common law, is provided by the statutes of a State, a party seeking to recover thereon must allege that the right accrued in such State.¹² In this respect, a broad distinction is made between the allegations necessary in an action known to the common law and actions purely statutory.¹³

1 Moxley v. Moxley, 2 Met. (Ky.) 311; Hubble v. Mullanphy, Hardin, 295; People v. Ryder, 12 N. Y. 433.

2 Howland v. Davis, 40 Mich. 545; Fallis v. Howarth, Wright, 303.

3 Lockwood v. Bigelow, 11 Minn. 113; Vance v. Blair, 18 Ohio, 532.

4 Backus v. Clark, 1 Kan. 303; Van Rensselaer v. Jones, 2 Barb. 643; Gentry v. Doolin, 1 Bush, 1; Lyon v. Clark, 1 Smith, E. D. 250; 8 N. Y. 143; Lester v. Jewett, 11 N. Y. 453; Dubois v. Beaver, 34 Barb. 547; 25 N. Y. 123; Spencer v. Trafford, 42 Md. 1.

5 Lockwood v. Bigelow, 11 Minn. 113. Compare Kansas Pacific R. R. Co. v. McCormick, 20 Kan. 110.

6 Balch v. Wilson, 25 Minn. 299; Williams v. Nesbit, 65 Ind. 171.

7 Kellogg v. Baker, 15 Abb. Pr. 286; Brown v. Harmon, 21 Barb. 508; Martin v. Kanouse, 2 Abb. Pr. 330.

8 Townshend v. Norris, 7 Hun, 239; McCormick v. Blossom, 40 Iowa, 256. And see Wisner v. Ocumpaugh, 71 N. Y. 113. When a complaint alleges that the act upon which the suit is founded was done on a certain day, it must be presumed that the action was commenced after that day: Prentice v. Ashland County, 56 Wls. 345.

9 *Vermilya v. Beatty*, 6 Barb. 420.

10 *Clark v. Dales*, 20 Barb. 42. See *Wood v. Bates*, *Wright*, 545.

11 *Thatcher v. Morris*, 11 N. Y. 437.

12 *Beach v. Bay State Steamboat Co.* 18 How. Pr. 335; 30 Barb. 433; 10 Abb. Pr. 71. And see *Nashville etc. R. R. Co. v. Sprayberry*, 9 Heisk. 852; *Hobbs v. Memphis etc. R. R. Co.* 9 Heisk. 873; 12 Heisk. 526.

13 See *Beach v. Bay State Steamboat Co.* 18 How. Pr. 335; 30 Barb. 433; 10 Abb. Pr. 71.

§ 14. **Allegations of quantity or value.**—Extreme exactness is not required in allegations of quantity or value.¹ And when such allegations are not descriptive of the subject of the action, they need not be proved as alleged;² and a party is not estopped from proving the true value when he has, by mistake, alleged it incorrectly, or where it has changed since the allegation was made.³ In an action in the nature of trover, where the damages are merely nominal, the averment of value is but a matter of form.⁴ But in an action for goods sold, or for services, the allegation of the value thereof in the complaint is held to be material.⁵

1 *Martin v. Kanouse*, 2 Abb. Pr. 330; *Chamblee v. McKenzie*, 31 Ark. 155. See *Ragsdale v. Lander*, 80 Ky. 61.

2 *Chamblee v. McKenzie*, 31 Ark. 155. Strictness as it regards allegations of quantity is not generally required, unless the subject of the averment is a record, or written instrument, or an express contract: *Gwinnet v. Phillips*, 3 Term Rep. 643; *Van Rensselaer v. Jones*, 2 Barb. 643.

3 *Reilly v. Ringland*, 39 Iowa, 106. And see *Stearns v. Dubois*, 55 Ind. 257; *Baird v. Truitt*, 18 Kan. 120.

4 *Woodruff v. Cook*, 25 Barb. 505; *Connors v. Meir*, 2 Smith, E. D. 314.

5 *Gregory v. Wright*, 11 Abb. Pr. 417.

§ 15. **Facts to be stated positively.**—It is a fundamental rule of good pleading that facts within the knowledge of the pleader should be stated *positively*, in an issuable form,¹ and should not be alleged in a hypothetical or alternative form.² But a complaint or petition is not ambiguous or evasive by reason of the single fact that allegations are made upon information and

belief.³ And the rule which requires all averments to be direct and positive is not violated when the pleader sets forth facts as avowed upon information and belief.⁴ Whether the facts are stated upon information or knowledge, it is equally the existence of the fact that is averred.⁵

1 Frary v. Dakin, 7 Johns. 75; Blake v. Eldred, 18 How. Pr. 240; Lewis v. Kendall, 6 How. Pr. 53; State v. Tuffts, 28 Ark. 502; State Bank v. Oliver, 1 Disn. 159; Grant v. Bell, 87 N. C. 41.

2 Hamilton v. Hough, 13 How. Pr. 14; Wiles v. Fanning, 9 How. Pr. 543; Commonw. v. Abell, 6 Marsh. J. J. 430; Jamison v. King, 50 Cal. 132; Ladd v. Ramsby, 10 Oreg. 207.

3 Thackara v. Reid, 1 Utah, 240.

4 Radway v. Mather, 5 Sand. 654; Truscott v. Dolc, 7 How. Pr. 221; St. John v. Beers, 24 How. Pr. 377. But see Williams v. First Presbyterian Soc. 1 Ohio St. 504.

5 New York etc. Iron Works v. Smith, 4 Duer, 362.

§ 18. **Facts to be stated concisely.**—The facts constituting each cause of action must be concisely stated, without unnecessary repetition.¹ Counts in pleading, technically speaking, are entirely unknown to the Code system, and the plaintiff is restricted to a single statement of his cause of action.² Thus, a plaintiff is not allowed to set forth, in different counts, in his complaint, several distinct causes of action against the defendant for the same indebtedness.³ If the complaint contains but one cause of action, there can be but one statement of it.⁴ The facts cannot be subdivided so as to present, fictitiously, two or more causes of action.⁵ But the rule requiring conciseness in pleading is not extended so far as to render material allegations irrelevant or redundant, simply because they are too verbosely expressed;⁶ it is only redundancy of matter that is objectionable in a strictly legal sense.⁷

1 See § 7, *ante*; Moore v. Hobbs, 77 N. C. 65; San Juan etc. Smelting Co. 5 Colo. 214.

2 Slippery v. Troy etc. R. R. Co. 9 How. Pr. 83; Nash v. McCauley, 9 Abb. Pr. 159; Fern v. Vanderbilt, 13 Abb. Pr. 72; Fox v. Penn. R. R. Co. 2 Handy, 169; Mays v. Lewis, 4 Tex. 38.

3 *Ford v. Mattice*, 14 How. Pr. 91. And see *Churchill v. Churchill*, 9 How. Pr. 582; *Dickens v. New York etc. R. R. Co.* 13 How. Pr. 228; *Birdseye v. Smith*, 32 Barb. 221; *Roberts v. Leslie*, 14 Jones & S. 76.

4 *Hepburn v. Babcock*, 9 Abb. Pr. 153, n. Compare *Wetmore v. Porter*, 92 N. Y. 76.

5 *Sturges v. Burton*, 5 Ohio St. 215; *Ferguson v. Gilbert*, 16 Ohio St. 83.

6 *Warrin v. Struller*, 11 N. Y. Leg. Obs. 9..

7 *Warrin v. Struller*, 11 N. Y. Leg. Obs. 94; 2 *Walt's Pr.* 321.

§ 17. **Consistency in pleading is required.**—The allegations of a pleading should be consistent with each other, and a pleading which contains inconsistent statements should be construed against the pleader.¹ So, it is an established rule of pleading, that only such causes of action can be united in the same complaint as are consistent with each other.² But a complaint may unite legal and equitable causes of action, and if not inconsistent, and the evidence sustains either the legal or equitable cause of action, judgment should be rendered accordingly.³ A demand of relief and of judgment for a specified sum would be inconsistent;⁴ so of a claim for conversion, and also for redelivery of the same property;⁵ so of a claim for rent, and as for use and occupation.⁶ A complaint which seeks to affirm a contract, and also to set it aside, is inconsistent and bad in form.⁷ And a complaint so framed that it will admit proof of an implied contract to pay what services are reasonably worth, as well as an express promise to pay a particular sum therefor, is objectionable on the ground of inconsistency.⁸ But it was held otherwise in California, in accordance with the rule that the plaintiff may set out the facts constituting the cause of action in two separate forms, when there is a fair and reasonable doubt of his ability to safely plead them in one mode only.⁹ Allegations in a complaint that the sheriff collected money on an execution which he failed to pay over, and charging him with gross neglect of duty for not having

collected the money, are held to be repugnant to and mutually destructive of each other.¹⁰ A complaint may, however, state several grounds or reasons for the relief demanded, or where there is some uncertainty as to the exact ground of recovery, may be so framed as to meet the contingencies of the trial.¹¹ And if a complaint sets forth but a single cause of action, the fact that it is divided and stated as two causes of action does not make it two.¹² So, a party who appears to have a good cause of action will not be turned out of court simply because the pleader has stated the facts in an artificial manner, or has joined several different causes of action in one count, unless the objection thereto is specifically raised.¹³

1 *Hillebrant v. Booth*, 7 Tex. 501; *Building Association v. O'Conner*, 29 Ohio St. 655; *Butler v. Kaulback*, 8 Kan. 671; *Board of Education v. Shaw*, 15 Kan. 41. Compare *Supervisors v. O'Malley*, 46 Wis. 35.

2 *Young v. Edwards*, 11 How. Pr. 201; *Henderson v. Jackson*, 40 How. Pr. 163; 9 Abb. Pr. N. S. 303; *Quintard v. Newton*, 5 Robt. 80; *Jamison v. King*, 50 Cal. 132; *Campbell v. McElevay*, 2 Disn. 584; *Thomas v. Railroad Co.* 97 N. Y. 245.

3 *New York Ice Co. v. Northwest, Ins. Co.* 21 How. Pr. 296; *Sheehan v. Hamilton*, 3 Abb. Pr. N. S. 197; 2 Keyes, 304; *Latin v. McCarty*, 41 N. Y. 107.

4 *Durant v. Gardner*, 10 Abb. Pr. 445; 19 How. Pr. 94.

5 *Maxwell v. Farnam*, 7 How. Pr. 236.

6 *Dean v. Leonard*, 9 Minn. 130.

7 *Trimble v. Doty*, 16 Ohio St. 129. And see *Morris v. Rexford*, 18 N. Y. 552.

8 *Hewitt v. Brown*, 21 Minn. 163; *Plummer v. Mold*, 22 Minn. 15.

9 *Wilson v. Smith*, 61 Cal. 200. And see *Longprey v. Yates*, 31 Hun, 432.

10 *Thomas v. Browder*, 33 Tex. 733.

11 *Velle v. Newark etc. Ins. Co.* 65 How. Pr. 1; 12 Abb. N. C. 309. And see *Whitney v. Chicago etc. Railway Co.* 27 Wis. 327; *Van Brunt v. Mather*, 48 Iowa, 503; *Stearns v. Dubois*, 55 Ind. 257; *Birdseye v. Smith*, 32 Barb. 217; *Talcott v. Van Vechten*, 25 Hun, 566; *Barnes v. Jones*, 16 N. Y. Week. Dig. 191.

12 *Welch v. Platt*, 32 Hun, 194; 5 N. Y. Civ. Proc. R. 433; 19 N. Y. Week. Dig. 265.

13 *Wetmore v. Porter*, 92 N. Y. 76. And see *Williams v. State*, 70 N. Y. 601; *Wright v. Wright*, 54 N. Y. 437.

‡ 18. **Averment of damages.**—No more damages can be recovered than are claimed in the complaint or

petition;¹ and when a jury gives greater damages than are claimed, the plaintiff cannot have judgment unless he remit all over the amount claimed.² General damages, such as necessarily and naturally result from the injury complained of, need not be expressly detailed or described in the complaint in order to authorize a recovery.³ It is enough to state a gross amount as a consequence of the injury.⁴ But where damages which are the natural consequences of an act, though not necessarily the result of it, are sought to be recovered, they must be specially alleged in the complaint,⁵ in order that the defendant may be prepared with evidence to rebut the proof offered of such damages, or the amount or extent of them.⁶ Special damages are confined almost exclusively to actions arising on tort, and need be averred only where the right of action depends upon the fact that damage has been sustained.⁷ But where the special damage is the foundation of the cause of action, it is a material allegation, and must be fully and accurately stated.⁸ Thus, in actions for slander, for words not actionable *per se*, the right to recover depends upon the question whether they caused special damage, and special damage must be alleged.⁹ And damages which may properly be alleged should be pleaded with fullness and accuracy.¹⁰ In an action for assault and battery, special damages must be particularly alleged.¹¹ But bodily or mental suffering, and anxiety of mind, resulting as the natural and direct consequence of a personal injury, need not be specially alleged.¹² And in an action of trespass it is not necessary, in order to recover damages which necessarily and naturally result from the injury complained of, to specifically allege them in the complaint.¹³ But in an action in the nature of trespass *de bonis asportatis*, the plaintiff's expenses in recovering the posses-

sion of the property should be specially pleaded.¹⁴ So in an action for malicious prosecution, the amount of costs and counsel fees expended by the plaintiff, in defending the prosecution, is matter of special damage, and must be specially alleged and proved.¹⁵ In an action for injuries to land, damages for loss of rents cannot be recovered unless specially alleged.¹⁶ And in an action for the possession of land, mesne profits cannot be recovered unless they be specially claimed.¹⁷ Nor are special damages, for the detention of premises after the expiration of the term, recoverable, unless alleged in the complaint.¹⁸ If it is sought to recover special damage for failure to deliver goods, where there is no market wherein to purchase, such special damage must be alleged and set forth in the pleading.¹⁹

1 *Curtiss v. Lawrence*, 17 Johns. 111; *Dox v. Dey*, 3 Wend. 356; *Cameron v. Boyle*, 2 Iowa, 154; *Rives v. Kumber*, 27 Ill. 291.

2 *Decker v. Parsons*, 11 Hun, 295; *Crews v. Lackland*, 67 Mo. 619; *White v. Cannada*, 26 Ark. 41.

3 *Laraway v. Perkins*, 10 N. Y. 371; *Jutte v. Hughes*, 67 N. Y. 267; *Fitch v. Fitch*, 3 Jones & S. 302; *Sculer v. Gould*, 14 Wend. 159; *Argotsinger v. Vines*, 82 N. Y. 308; *Phillips v. Hoyle*, 4 Gray, 568; *Camden etc. Oil Co. v. Schlens*, 59 Md. 31.

4 See *Harrington v. St. Paul etc. R. R. Co.* 17 Minn. 215; *Eten v. Luyster*, 5 Jones & S. 486; *Louisville etc. R. R. Co. v. Smith*, 68 Ind. 575.

5 *Low v. Archer*, 12 N. Y. 277; *Donnell v. Jones*, 13 Ala. 490; *Bogert v. Burkhalter*, 2 Barb. 525; *Neary v. Bostwick*, 2 Hilt. 514; *Baldwin v. New York etc. Nav. Co.* 4 Daly, 314; *Taylor v. Monroe*, 43 Conn. 36; *Nunan v. City of San Francisco*, 38 Cal. 689; *Rice v. Coolidge*, 121 Mass. 393; *Burrage v. Melson*, 48 Miss. 237; *Brackett v. Edgerton*, 14 Minn. 174. And see *Sloan v. Edwards*, 61 Md. 89.

6 *Shaw v. Hoffman*, 21 Mich. 151; *Solms v. Lias*, 16 Abb. Pr. 311; *Barnard v. Berwind*, 7 N. Y. Week. Dig. 519.

7 *Baggott v. Boulger*, 2 Duer, 160; *Molony v. Dows*, 15 How. Pr. 261; *McTavish v. Carroll*, 13 Md. 429; *Roberts v. Hyde*, 15 La. An. 51. An averment of special damage is not traversable unless when it is the gist of the action: *Thompson v. Lumley*, 7 Daly, 74.

8 *Havemeyer v. Fuller*, 60 How. Pr. 316. And see *Taylor v. Keeler*, 50 Conn. 346.

9 *Bassell v. Ellmore*, 65 Barb. 627; 48 N. Y. 561; *Anon.* 60 N. Y. 262; 19 Am. Rep. 174; *Like v. McKinstry*, 41 Barb. 186; *Kendall v. Stone*, 5 N. Y. 14; *Foulger v. Newcomb*, Law R. 2 Ex. 327. But special damage need not be alleged or proved in an action for slander upon words actionable *per se*: *Yeates v. Reed*, 4 Blackf. 463; 32 Am. Dec. 43; *Newbit v. Statuck*, 35 Me. 315; 58 Am. Dec. 706.

10 *Linden v. Graham*, 1 Duer, 670; *Hallock v. Miller*, 2 Barb. 630; *Havemeyer v. Fuller*, 60 How. Pr. 316; *Simmons v. Kayser*, 11 Jones & S. 131; *Gelsler v. Brown*, 6 Neb. 254; *Whitmore v. Bowman*, 4 Iowa, 148; *Stiebeling v. Lockhaus*, 21 Hun, 457.

11 *Stevens v. Rodger*, 25 Hun, 54. And see *O'Leary v. Rowan*, 31 Mo. 117. But in an action in damages for assault and battery it is competent for the plaintiff to offer in evidence, and for the jury to consider the fact, that, as a result of the battery alleged, the plaintiff had become subject to convulsions or fits, although such fact was not specially alleged as a ground of special damage: *Sloan v. Edwards*, 61 Md. 89. And see *Galther v. Blowers*, 11 Md. 552; *Tyson v. Booth*, 100 Mass. 258; *Curtis v. Rochester etc. R. R. Co.* 20 Barb. 282; 18 N. Y. 534.

12 *Wright v. Compton*, 53 Ind. 337; *Curtis v. Rochester etc. R. R. Co.* 20 Barb. 282; 18 N. Y. 534.

13 *Argotsinger v. Vines*, 82 N. Y. 308.

14 *Gray v. Bullard*, 22 Minn. 278.

15 *Thompson v. Lumley*, 7 Da.y, 74.

16 *Squier v. Gould*, 14 Wend. 157; *Wampach v. St. Paul etc. R. R. Co.* 21 Minn. 364; *Potter v. Froment*, 47 Cal. 153. Compare *Jutte v. Hughes*, 67 N. Y. 267.

17 *Livingston v. Tanner*, 12 Barb. 481.

18 *Rothschild v. Williamson*, 83 Ind. 387.

19 *Parsons v. Sutton*, 63 N. Y. 92.

§ 19. **Averment of consideration.**—Where a consideration is not implied, it is the very gist of an action founded upon contract, and must be specially averred.¹ The complaint should disclose the facts, from which it must appear that there was a legal consideration to support the agreement relied on.² Thus, if an executory agreement between the parties is the consideration of a contract forming the basis of an action between them, this must be pleaded and performance averred.³ If the contract was founded upon a past act as its consideration, it is usually necessary to allege that such act was performed at the request of the defendant.⁴ If the instrument upon which action is brought purports to be "for value received," and is set out in the complaint, consideration is sufficiently alleged.⁵ In an action upon an instrument under seal, no consideration need be alleged, for a seal imports a consideration.⁶ So, in an action upon a promissory note or bill of exchange, no

consideration need be alleged, since the law implies that a note was given upon a sufficient consideration, and it is unnecessary to aver what is implied in law.¹

1 *Spear v. Downing*, 34 Barb. 522; 12 Abb. Pr. 437; 22 How. Pr. 30; *Burnett v. Blasco*, 4 Johns. 235; *Marshall v. Alken*, 25 Vt. 328.

2 *Winne v. Colorado Springs Co.* 3 Colo. 155; *Glasscock v. Glasscock*, 66 Mo. 627; *Dolcher v. Fry*, 37 Barb. 152; *Ross v. Sadgbeer*, 21 Wend. 166.

3 *Becker v. Sweetzer*, 15 Minn. 427.

4 *Parker v. Crane*, 6 Wend. 647; *Spear v. Downing*, 34 Barb. 522; 12 Abb. Pr. 437; 22 How. Pr. 30. Compare *Farnsworth v. Clark*, 44 Barb. 601; *Acome v. Am Min. Co.* 11 How. Pr. 24.

5 *Prindle v. Caruthers*, 15 N. Y. 425; *Meyer v. Hibsher*, 47 N. Y. 265; *Leonard v. Sweetzer*, 16 Ohio, 1.

6 *Reddish v. Harrison*, Wright, 221; *Douglass v. Howland*, 24 Wend. 35; *Bush v. Stevens*, 24 Wend. 256; *Northern Kansas Town Co. v. Oswald*, 18 Kan. 336; *Paddock v. Hume*, 6 Oreg. 82.

7 *Pinney v. King*, 21 Minn. 514; *Underhill v. Phillips*, 10 Hun, 591; *Tibbetts v. Blood*, 21 Barb. 650; *Durland v. Pitcairn*, 51 Ind. 426; *Bank of Orleans v. Barry*, 1 Denio, 116; *Caples v. Branham*, 20 Mo. 244; *Thackeray v. Hanson*, 1 Colo. 365.

§ 20. *Allegation of fraud.*—Where it is sought to maintain a cause of action on the ground of fraud, the facts constituting the fraud must be alleged;¹ and a mere general charge of fraud is a legal conclusion, and insufficient.² But while the facts which constitute the fraud must be alleged, it is not necessary to state minutely all the acts and circumstances tending to prove the general charge.³ If the very statement of the facts of the case involve an allegation of an intent to defraud, an express averment of such intent is not necessary.⁴ So, the rule that facts constituting fraud must be directly alleged does not apply to an agreed case where all the facts are stated, and matters of legal inference are left to the court.⁵ And it is held that when the facts constituting the fraud are not clearly known by the plaintiff, they may be alleged in the alternative.⁶ But the complaint or petition must show the connection of the fraud with the alleged damage, so that it may appear to the court that the fraud and

the damage sustain to each other the relation of cause and effect, or at least that the one might have resulted directly from the other.⁷

1 *Chautauque County Bank v. White*, 6 N. Y. 236; *Libby v. Rosekrans*, 55 Barb. 202; *Butler v. Viele*, 44 Barb. 166; *Smith v. Sims*, 77 Mo. 269; *Darnell v. Rowland*, 30 Ind. 342; *West v. Wright*, 98 Ind. 335; *Bailey v. Ryder*, 10 N. Y. 363.

2 *Clark v. Dayton*, 6 Neb. 192; *Butler v. Viele*, 44 Barb. 166; *O'Kendon v. Barnes*, 43 Iowa. 615; *Mason v. Searles*, 56 Iowa. 532; *Leavenworth etc. R. R. Co. v. Douglass County*, 18 Kan. 169; *Mut. Loan etc. Assoc. v. Price*, 19 Fla. 127. A complaint which alleges that the defendants "in concert did, by connivance, conspiracy, and combination, cheat and defraud the plaintiffs out of certain goods of" a specified value, does not state facts sufficient to constitute a cause of action: *Cohn v. Goldman*, 76 N. Y. 284.

3 *Cummings v. Thompson*, 18 Minn. 246; *Cowen v. Toole*, 31 Iowa, 513. And see *Barber v. Morgan*, 51 Barb. 116; *Whittlesey v. Delaney*, 73 N. Y. 571.

4 *Sharp v. Mayor etc.* 40 Barb. 256; 25 How. Pr. 389; *Singleton v. Scott*, 11 Iowa, 589; *Whittlesey v. Delaney*, 73 N. Y. 571.

5 *McRae v. Battle*, 60 N. C. 98.

6 *Rasmussen v. McNight*, Sup. Ct. Utah, 2 West C. Rep. 205.

7 *Byard v. Holmes*, 34 N. J. L. 296. And see *Bremond v. McLean*, 45 Tex. 10.

§ 21. *Allegation of demand.*—In many cases a demand is necessary before bringing suit, and when this is so, a demand must be alleged in the complaint or petition and proved upon the trial.¹ Thus, in an action for the detention of personal property which came lawfully into the defendant's possession, a demand before suit brought is necessary, and must be alleged.² And if it be expressly agreed between parties to a contract that neither shall be liable for non-performance until after a demand for performance, the complaint in an action upon such liability must allege that the demand has been made.³ And where the demand is required to be made in a particular form, the complaint must allege that it was made in the form required.⁴ If a demand is necessary to fix the liability of sureties on an undertaking, it is parcel of the contract, and must be made before the commencement of an action for the breach of

the undertaking, and in the action itself it must be averred and proved.⁵ As a general rule, a demand of the principal debtor is necessary to render the guarantor of the debt liable, and in an action against the latter a demand must be alleged.⁶ In an action on a promissory note, payable at a particular place, it is not necessary to aver or prove a demand of payment, as against the maker.⁷ A demand made of one of two joint debtors is a demand on both, and may be so pleaded.⁸

1 Moore v. Hudson River R. R. Co. 12 Barb. 156; State v. Cowles, 5 Ohio St. 87; Greenwood v. Curtis, 6 Mass. 634; Boutwell v. O'Keefe, 32 Barb. 434. And see Bush v. Stephens, 24 Wend. 256; Blood v. Goodrich, 9 Wend. 63; Gibbs v. Stone, 7 Mon. R. 302; Williams v. Germaine, 7 Barn. & C. 468. No averment of demand is necessary in an action on a note payable on demand: Hirst v. Brooks, 50 Barb. 334; Howland v. Edmonds, 24 N. Y. 307; Herrick v. Woolverton, 41 N. Y. 531; Pierce v. Fothergill, 2 Bing. N. C. 167. Nor in an action upon contract to pay money absolutely: East River Bank v. Rogers, 7 Bosw. 493; Lake Ontario etc. R. R. Co. v. Mason, 16 N. Y. 451.

2 Baird v. Walker, 12 Barb. 293; Powers v. Bassford, 19 How. Pr. 309; Gillett v. Roberts, 57 N. Y. 23; New York Car Oil Co. v. Richmond, 19 How. Pr. 505; 10 Abb. Pr. 185; Simmons v. Lyons, 55 N. Y. 671; Tripp v. Pulver, 2 Hun, 511.

3 Ferner v. Williams, 14 Abb. Pr. 215; 37 Barb. 9. And see Howard v. France, 43 N. Y. 593; Smith v. Tiffany, 36 Barb. 23.

4 Carpenter v. Brown, 6 Barb. 147; Bush v. Stephens, 24 Wend. 256; Lutweller v. Linnell, 12 Barb. 512.

5 Morgan v. Menzies, Sup. Ct. Cal. 2 West C. Rep. 882. And see S. C. before, 60 Cal. 341.

6 Milliken v. Byerly, 6 How. Pr. 214. And see Douglass v. Rathbone, 5 Hill, 143; Nelson v. Bostwick, 5 Hill, 27.

7 Hill v. Place, 5 Abb. Pr. N. S. 13; 36 How. Pr. 26; 48 N. Y. 530; 7 Robt. 389. But in order to charge the indorser upon a note payable at a particular place, the complaint must contain an averment to the effect that payment was demanded at such place: Ferner v. Williams, 14 Abb. Pr. 215. But compare Cutler v. Ainsworth, 21 Wis. 381.

8 Baird v. Walker, 12 Barb. 293; McFarland v. Crary, 8 Cowen, 253; Gelsler v. Acosta, 9 N. Y. 227; Griswold v. Plumb, 13 Mass. 298.

§ 22. **Performance of conditions.**—Where the plaintiff's right of action depends upon the performance by him of a condition precedent, he is bound to aver a performance, or some excuse for the non-performance must be duly pleaded.¹ If an excuse is relied upon, he should aver his readiness to perform, and the particular cir-

cumstances constituting such excuse should be set forth.¹ But in pleading the performance of a condition precedent under the Code system, it is sufficient to allege generally that the party has performed all the conditions on his part;² as, in an action on a note, that payment thereof "was duly demanded at maturity," that it was "duly protested for non-payment," and that "notice thereof was duly given."³ But if a party undertakes to make a specific allegation of performance, he must make it with the particularity and strictness required by the rules of the common law.⁴ In case of mutual conditions, to be performed by the parties at the same time, it is not sufficient for the plaintiff to aver a readiness to perform on his part and a neglect or refusal of the defendant to perform, but he must aver either actual performance or a tender of performance on his part.⁵ Though it is unnecessary to make a tender of performance when it would be wholly nugatory.⁷

1 *Oakley v. Morton*, 11 N. Y. 23; *Wolfe v. Howes*, 10 N. Y. 197; *Webb v. Smith*, 6 Col. 365. And see *Ferris v. Purdy*, 10 Johns. 359; *Robb v. Montgomery*, 20 Johns. 15; *Fickett v. Brice*, 22 How. Pr. 194; *Jennings v. Moss*, 4 Tex. 452; *Clendennan v. Paulsel*, 3 Mo. 230; *Harrison v. Taylor*, 3 Marsh. A. K. 163; *Wilcox v. Cohn*, 5 Blatchf. 346; *Lightfoot v. Cole*, 1 Wis. 26; *Buford v. N. Y. Life Ins. Co.* 5 Oreg. 334.

2 *Oakley v. Morton*, 11 N. Y. 23; *Smith v. Brown*, 17 Barb. 431; *Home Ins. Co. v. Duke*, 43 Ind. 418; *Cornwell v. Haight*, 21 N. Y. 462.

3 *Home Ins. Co. v. Duke*, 43 Ind. 418; *Lowry v. Megee*, 52 Ind. 107; *Crawford v. Satterfield*, 27 Ohio St. 421; *Smith v. Railroad Co.* 19 Wis. 326; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Schobacher v. Germantown etc. Ins. Co.* 59 Wis. 96. And see *Ferrer v. Home Mut. Ins. Co.* 47 Cal. 416; *Etna Ins. Co. v. Kittles*, 81 Ind. 96; *Richardson v. North Mo. Ins. Co.* 57 Mo. 413.

4 *Frankfort Bank v. Countryman*, 11 Wis. 398; *Davis v. Barron*, 13 Wis. 227. Setting out performance of a condition precedent in the language of the condition is sufficient: *Smith v. Lloyd*, 16 Gratt. 295.

5 *Home Ins. Co. v. Duke*, 43 Ind. 418. And see *Hatch v. Peet*, 23 Barb. 575.

6 *Thomas v. Wickmann*, 1 Daly, 58; *Williams v. Healey*, 3 Denio, 363; *Beecher v. Conradt*, 13 N. Y. 103. See *Van Schaick v. Winne*, 16 Barb. 89; *Webb v. Smith*, 6 Colo. 365; *Delaware etc. Canal Co. v. Penn. Coal Co.* 50 N. Y. 250; *Smith v. Brown*, 17 Barb. 431; *St. Paul Div. Sons of Temperance v. Brown*, 9 Minn. 157; *Griffiths v. Hender*.

son, 49 Cal. 566; *Lewis v. Davis*, 21 Ark. 237; *Sorrells v. McHenry*, 38 Ark. 127.

7 *Karker v. Haverly*, 50 Barb. 79; *Read v. Lambert*, 10 Abb. Pr. N. S. 428.

§ 23. **Averment of notice.**—The general rule of pleading, as it respects the necessity of averring notice, is that when the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the party pleading than of the adverse party, notice thereof should be averred;¹ but it is otherwise where both parties are supposed to be alike cognizant of the fact.² If, however, notice is necessary, either by the terms or nature of the contract, it is of the gist of the action, and must be specially averred, and without such averment no complete right of action can appear.³ And if the plaintiff relies upon facts which excuse notice, he must state such facts in his complaint or petition.⁴ Evidence of facts excusing notice is not admissible under a bare averment of due notice.⁵

1 *Bush v. Critchfield*, 4 Ohio, 103; *Lent v. Padelford*, 10 Mass. 238; *Carlisle v. Cahawba etc. R. R. Co.* 4 Ala. 70; *Slacum v. Pomeroy*, 6 Cranch, 221; *Cole v. Jessup*, 2 Barb. 309.

2 *Cole v. Jessup*, 2 Barb. 309; *Carlisle v. Cahawba etc. R. R. Co.* 4 Ala. 70; *Clough v. Hoffman*, 5 Wend. 499.

3 *Watson v. Walker*, 23 N. H. 471.

4 *Garvey v. Fowler*, 4 Sand. 665; *Shultz v. Depuy*, 3 Abb. Pr. 252. See *Firth v. Thrush*, 8 Barn. & C. 387.

5 *Garvey v. Fowler*, 4 Sand. 665. Compare *Purchase v. Mattison*, 7 Duer, 537.

§ 24. **Averment of knowledge or scienter.**—In some cases, knowledge in the defendant constitutes the gist of the action, and must be averred.¹ Thus, the owner of a domestic animal is not in general liable in an action for an injury committed by such animal, unless it be alleged and shown that he had notice or knowledge of its vicious propensity.² But as to animals of a wild and ferocious nature, such as lions, tigers, leopards, panthers, bears, and the like, the person who keeps

them is liable for any damage they may do, without any allegation of knowledge of their ferocity, on the ground that by nature such animals are fierce and dangerous.³ So, if any animal commits an injury while trespassing upon the land of another, the owner of the animal is liable without alleging or proving a *scienter*.⁴ In an action for a deceit in the sale of a chattel, where the fraud is the gist of the action, if there is no evidence of a *scienter*, the action cannot be sustained.⁵ But in an action for a breach of absolute warranty, it is unnecessary to allege a *scienter*, as upon the representation of a warranty the party is bound to accountability for an unsoundness in the thing warranted, whether he knew it or not.⁶ Allegations of knowledge, when necessary, should be positively and distinctly made;⁷ but an allegation that the defendant "falsely and fraudulently represented" is held to sufficiently import a *scienter*.⁸

1 Vrooman v. Lawyer, 13 Johns. 330; Tiff v. Tiff, 4 Denio, 175; Smith v. Causey, 22 Ala. 568; Dearth v. Baker, 22 Wis. 73; Hubbard v. Russell, 24 Barb. 404.

2 Fairchild v. Bentley, 30 Barb. 147; Earl v. Van Alstine, 8 Barb. 630; Laverone v. Mangianti, 41 Cal. 138; 10 Am. Rep. 269; Partlow v. Haggarty, 35 Ind. 178; Wormley v. Gregg, 65 Ill. 251; Van Leuven v. Lyke, 1 N. Y. 515; Worth v. Gilling, Law R. 2 C. P. 1.

3 Van Leuven v. Lyke, 1 N. Y. 515; Scribner v. Kelley, 38 Barb. 14.

4 Van Leuven v. Lyke, 1 N. Y. 515; Fairchild v. Bentley, 30 Barb. 147; Dickson v. McCoy, 39 N. Y. 401; Decker v. Gammon, 44 Me. 322; Dunckle v. Kocker, 11 Barb. 387.

5 Moore v. Noble, 53 Barb. 425; 36 How. Pr. 385. And see Lamb v. Kelsey, 54 N. Y. 645; Weed v. Case, 55 Barb. 534.

6 Moore v. Noble, 53 Barb. 425; 36 How. Pr. 385. But see Mahurin v. Harding, 28 N. H. 128.

7 See Spencer v. Southwick, 9 Johns. 314; Zabriskie v. Smith, 18 N. Y. 322.

8 Thomas v. Beebe, 25 N. Y. 224. And see Eviston v. Cramer, 47 Wis. 659; Browne v. Moore, 32 Mich. 254; Mead v. Mall, 25 Barb. 578; 15 How. Pr. 347.

§ 25. **Averment of title or ownership.**—The plaintiff's title to or ownership of the claim in suit must in general be alleged.¹ Thus, in an action to recover the pos-

session of personal property the complaint must allege ownership, either general or special, and the statement of a mere legal conclusion that the plaintiff is entitled to the possession is not sufficient.² But where ownership in the plaintiff is once shown, its continuance is presumed, and need not be alleged.³ As it respects the ownership of a note on which suit is brought, it is sufficient for the plaintiff to allege that he is the holder and owner thereof, and a complaint thus worded will imply that he owns the instrument in some legal manner of deriving title.⁴ And ownership of the note by the plaintiff is sufficiently shown by alleging its making, indorsement, and delivery to him before maturity, for a valuable consideration;⁵ an allegation that he is the owner and holder is unnecessary.⁶ In an action by an assignee in bankruptcy to recover the assets, it is sufficient to allege that the plaintiff owns the property.⁷ If a general fact or result, such as ownership of land, is pleaded, and also the special facts by which such result is reached, and the facts do not support the result, the facts will control;⁸ a general allegation of ownership, dependent on such facts, will not supply the defect, although such allegation would have been a sufficient averment of title in the absence of the particular facts.⁹

1 See *Palmer v. Smedley*, 6 Abb. Pr. 203; 23 Barb. 463. The complaint should distinctly disclose the plaintiff's interest in the subject-matter: *Wright v. Field*, 64 How. Pr. 117.

2 *Beckwith v. Phillips*, 15 Wis. 223; *Tandle v. Cram*, 13 Kan. 344; *Baker v. Cordwell*, 6 Colo. 199; *St. Louis etc. R. R. Co. v. Hetch*, 38 Ark. 357; *Stickney v. Smith*, 5 Minn. 486; *Scofield v. Whitelegge*, 49 N. Y. 259; 12 Abb. Pr. N. S. 320; *Thompson v. Strauss*, 29 Hun. 256; *Wright v. Field*, 64 How. Pr. 117. And see N. Y. Code Civ. Proc. § 1720. But a general averment of ownership in the complaint is sufficient: *Stall v. Wilbur*, 77 N. Y. 162; *Heine v. Anderson*, 2 Duer, 318; *Malcolm v. O'Reilly*, 89 N. Y. 156; 14 Jones & S. 222; *Berney v. Drexel*, 63 How. Pr. 471, 475; *Sturman v. Stone*, 31 Iowa, 115; *Simmons v. Lyons*, 55 N. Y. 671; *Barclay v. Quicksilver Min. Co.* 6 Lans. 25. A complaint for conversion, alleging the plaintiff's ownership in the present tense only, is bad: *Smith v. Force*, 31 Minn. 119.

3 *Taylor v. Corbiere*, 8 How. Pr. 325; *Jaeger v. Hartman*, 13 Minn. 55; *Van Rensselaer v. Bonesteel*, 24 Barb. 365. Compare *Brevoort v. Brevoort*, 8 Jones & S. 211.

4 *Mechanics' Bank v. Stratton*, 36 How. Pr. 190; 5 Abb. Pr. N. S. 11; *Holstein v. Rice*, 15 How. Pr. 1; *Prindle v. Caruthers*, 15 N. Y. 425.

5 *Farmers' etc. Bank v. Wadsworth*, 24 N. Y. 547. And see *Billings v. Jane*, 11 Barb. 620; *Conn. Bank v. Smith*, 17 How. Pr. 487; *Thorp v. Keokuk Coal Co.* 43 N. Y. 253; *Houg v. Mendenhall*, 19 Minn. 235; *Rubelman v. McNichol*, 13 Mo. App. 584.

6 *Keteltas v. Myers*, 19 N. Y. 231.

7 *Dabbman v. White*, 48 Cal. 439.

8 *Pinney v. Fridley*, 9 Minn. 34. And see *Armour Bros. Banking Co. v. Riley Co. Bank*, 30 Kan. 163.

9 *Pinney v. Fridley*, 9 Minn. 34. So where a complaint in an action to recover personal property contains the usual allegations of such a pleading, and adds specific facts exhibiting the nature of the plaintiff's title, the specific facts will be looked to as determining the plaintiff's right to recover: *Reynolds v. Copeland*, 71 Ind. 422.

§ 26. **Pleading contracts.**—A complaint which shows the making of a contract between the plaintiff and the defendant, and its violation by the defendant, and alleging the amount of damages resulting therefrom to the plaintiff, for which he asks judgment, contains the essential elements of a good cause of action.¹ Either the substance of the contract must be correctly set forth in the complaint or the contract itself must be set forth in its precise words.² But if a contract contains several distinct agreements, it is only necessary to set forth that portion of the contract which is complained of as being broken,³ and it may be stated according to its legal effect.⁴ The complaint need not set out any facts except such as are material to the plaintiff's cause of action.⁵ If the contract has been modified or altered by a subsequent agreement between the parties, the plaintiff must set forth the contract as altered, without noticing the terms of the original contract.⁶ And if the original contract has been wholly superseded by a subsequent one, the latter only should be set forth.⁷ In pleading the breach of a contract, the facts constituting the breach must be averred.⁸ It is, however, sufficient to assign a breach in the words of the contract, either negatively or affirmatively, or in words

co-extensive with the import and effect of the contract.⁹ Nor will the court require the breach to be set out in detail, where it can be averred generally.¹⁰ Where the plaintiff in an action has fully performed an express contract on his part, he may state his cause of action for the recovery of the amount due him, substantially in the form of the *indebitatus assumpsit* count at common law.¹¹

1 Wolf v. Schofield, 33 Ind. 175. And see *Estes v. Farnham*, 11 Minn. 434; *Hayden v. Steadman*, 3 Oreg. 550; *Borrow v. Emmerson*, 3 Oreg. 452.

2 Fairbanks v. Bloomfield, 2 Duer, 349; *Adams v. Mayor etc.* 4 Duer, 235; *Stack v. Heath*, 4 Smith, E. D. 95; 1 Abb. Pr. 331; *Alfaro v. Davidson*, 8 Jones & S. 87; *Stoddard v. Treadwell*, 26 Cal. 294; *Joseph v. Holt*, 37 Cal. 253. Compare *Crawford v. Satterfield*, 27 Ohio St. 421.

3 *Estes v. Farnham*, 11 Minn. 434; *Williams v. Healey*, 3 Denio, 363; *Sandford v. Halsey*, 2 Denio, 235; *Rollins v. St. Paul Lumber Co.* 21 Minn. 5; *Dorrington v. Myer*, 8 Neb. 211; *Crawford v. Satterfield*, 27 Ohio St. 421; *Detroit etc. R. R. Co. v. Forbes*, 30 Mich. 165; *McCampbell v. Vastine*, 10 Iowa, 538.

4 *Brown v. Champlin*, 66 N. Y. 214; *Estes v. Farnham*, 11 Minn. 434; *Joseph v. Holt*, 37 Cal. 253.

5 *Rollins v. St. Paul Lumber Co.* 21 Minn. 5.

6 *Smith v. Brown*, 17 Barb. 431; *Baldwin v. Munn*, 2 Wend. 399.

7 *Chesbrough v. New York etc. R. R. Co.* 13 How. Pr. 557; 26 Barb. 5.

8 *Schenck v. Naylor*, 2 Duer, 675; *Ward v. Hogan*, 11 Abb. N. C. 478; *Branham v. Johnson*, 62 Ind. 259; *Marie v. Garrison*, 13 Jones & S. 157; *Whitehill v. Shickle*, 43 Mo. 537; *Seely v. Hills*, 44 Wis. 484; *Moore v. Besse*, 30 Cal. 570; *Saxonia etc. Co. v. Cook*, 7 Colo. 569, 576.

9 *Jones County v. Sales*, 25 Iowa, 25; *Brown v. Stebbins*, 4 Hill, 154.

10 *Rowland v. Phalen*, 1 Bosw. 43; *Debenham v. Chambers*, 8 Mees. & W. 128. And see *Schurtz v. Kleinmeyer*, 36 Iowa, 392.

11 *Farron v. Sherwood*, 17 N. Y. 227; *Ludlow v. Dole*, 62 N. Y. 617; *Higgins v. Newtown etc. R. R. Co.* 66 N. Y. 604; 3 Hun, 611; *Larson v. Schmaus*, 31 Minn. 410.

§ 27. **Attaching copy of instrument as exhibit.**—According to the common-law form of pleading, the plaintiff in an action founded upon a deed or other instrument was not bound to file the instrument, and could only be made to produce it for the inspection of the defendant, and to furnish him a copy of it, upon his

prayer of *oyer* of the instrument.¹ A substitute for the common-law prayer of *oyer* is found under the Code system, in the requirement that where a pleading is founded on a written instrument, the original or a copy thereof must be filed with the pleading.² The party relying on a deed or other writing should file the instrument with the complaint or petition, and may be required to do so upon motion of the opposite party.³ But it is not good pleading to copy the written instrument into the pleading, nor to attach a copy making it a part of the pleading.⁴ The copy attached and filed with the complaint or petition forms no part of the pleading.⁵ And matters of substance necessary to be alleged in a complaint cannot be omitted, and the defect supplied by reference to an exhibit attached to the complaint.⁶ If a copy of a written instrument is not attached and filed with the pleading as required, the reason thereof must be shown in the pleading, and the sufficiency of the reason for the omission is to be decided by the court, and does not affect the merits of the action.⁷ The loss or destruction of the instrument is a sufficient excuse for the omission;⁸ and so if the instrument was in the defendant's possession, and he refused to surrender it.⁹ But the fact that a note is held by a third party is not a good reason for the omission to file it with the pleading.¹⁰

1 See Gould Pleading, ch. 8, §§ 34, 35; Egan v. Tewkesbury, 32 Ark. 43; Memphis Medical College v. Newton, 2 Handy, 165.

2 Egan v. Tewkesbury, 32 Ark. 43; Brown v. State, 44 Ind. 222; Ashley v. Foreman, 85 Ind. 55; Crawford v. Satterfield, 27 Ohio St. 421; McCormick Harvesting Machine Co. v. Glidden, 94 Ind. 447; Hight v. Taylor, 97 Ind. 392.

3 Egan v. Tewkesbury, 32 Ark. 43; Dorrington v. Meyer, 8 Neb. 211; Andrews v. Alcorn, 13 Kan. 351; Calvin v. State, 12 Ohio St. 60. In some States the omission to file is ground of demurrer: Brown v. State, 44 Ind. 222; Smith v. McLean, 24 Iowa, 322; Dyer v. Murdoch, 38 Mo. 224.

4 McCampbell v. Vastine, 10 Iowa, 538; Crawford v. Satterfield, 27 Ohio St. 421.

5 *Larimore v. Wells*, 29 Ohio St. 13. But see *Sorrells v. McHenry*, 38 Ark. 134. The instrument should be designated in some way so as to be identified, but if it follows the pleading it will be presumed to be the instrument referred to: *McCormick Harvesting Machine Co. v. Glidden*, 94 Ind. 447. And see *Hill v. Mayo*, 73 Ind. 357; *Carper v. Kitt*, 71 Ind. 24.

6 *City of Los Angeles v. Signoret*, 50 Cal. 298; *Brooks v. Paddock*, 6 Colo. 36. And see *Buck v. Fisher*, 2 Colo. 185; *Bowling v. McFarland*, 38 Mo. 464; *Gebhard v. Gardner*, 12 Bush, 325; *Hill v. Barrett*, 14 Mon. B. 67.

7 *Larimore v. Wells*, 29 Ohio St. 13. Objection to the omission must be taken before trial: *Kingsbury v. Buchanan*, 11 Iowa, 337; *Nosler v. Hunt*, 18 Iowa, 212.

8 *Sargent v. Railroad Co.* 33 Ohio St. 443.

9 *Larimore v. Wells*, 29 Ohio St. 13.

10 *Dyer v. Murdoch*, 38 Mo. 224.

§ 28. Pleading instrument for payment of money.—

Where a cause of action is founded upon an instrument for the unconditional payment of money only, it is sufficient for a party to set forth a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum, which he claims.¹ Such an allegation is equivalent to setting forth the instrument, according to its legal effect.² But the instrument so set forth must, upon its face, be a complete, valid, and binding obligation;³ and where, upon its face, the instrument is incomplete and invalid, and facts are not stated in it which need to appear in order to show its validity, such other facts must be alleged.⁴ So where the liability of the party, by the terms of the instrument, was conditional, and depended upon outside facts, those facts must be averred.⁵ It is not necessary that the instrument set forth should contain an express promise to pay;⁶ it is enough that it be one from the production of which, and proof of its execution, the law implies such a promise.⁷ So, in an action on a promissory note, whether the plaintiff be an original party to the note or not, the extrinsic facts which show his right or title to the note need not be expressly averred;⁸ the allegation of title is implied in the state-

ment that there is due to him a specific amount on the note, which he claims.⁹ An action to foreclose a mortgage given to secure the amount due upon a bond, and for a sale of the mortgaged premises, is not an action upon an instrument for the payment of money only, and pleading by copy is not therefore allowable in such case.¹⁰ So, an agreement of separation between husband and wife, which contains a stipulation for the payment to a trustee of a sum for the wife's support, is not an instrument for the payment of money only, and to set forth an agreement of this character *in extenso*, and declare a breach of it for failure to pay, is not good pleading.¹¹ All facts by way of inducement should be pleaded, to enable the court to decide whether or not a *prima facie* case is presented.¹² And it is held, that the transcript of a judgment is not an instrument for the unconditional payment of money only, which may be made part of the complaint or petition by reference.¹³

1 N. Y. Code Civ. Proc. § 534; Ohio Rev. Stats. § 5036; Tooker v. Arnoux, 76 N. Y. 397; Keteltas v. Myers, 19 N. Y. 231; Prindle v. Caruthers, 15 N. Y. 425; N. C. Code, § 222; Neb. Code, § 123; Kan. Code, § 123; Wis. Rev. Stats. ch. 123, § 24. An instrument in a foreign language may be so set forth in that language: Nourny v. Dubosty, 12 Abb. Pr. 123.

2 N. Y. Code Civ. Proc. § 534. And see Bank of Geneva v. Gulick, 8 How. Pr. 51.

3 Broome v. Taylor, 76 N. Y. 564. And see Spear v. Downing, 22 How. Pr. 30; 12 Abb. Pr. 437; 34 Barb. 522.

4 Broome v. Taylor, 76 N. Y. 564; Spear v. Downing, 34 Barb. 522; 22 How. Pr. 30; 12 Abb. Pr. 437.

5 Tooker v. Arnoux, 76 N. Y. 397.

6 Burke v. Oakley, 12 Hun, 637.

7 Burke v. Oakley, 12 Hun, 637.

8 Sargent v. Railroad Co. 32 Ohio St. 449; Prindle v. Caruthers, 15 N. Y. 425. But compare Conkling v. Gandall, 1 Keyes, 223; 4 Abb. Ct. App. 423; Woodruff v. Leonard, 1 Hun, 632; Marshall v. Rockwood, 12 How. Pr. 462; Alder v. Bloomingdale, 1 Duer, 601; Cottrell v. Conkling, 4 Duer, 45.

9 Sargent v. Railroad Co. 32 Ohio St. 443. Compare Spears v. Bond, 79 Mo. 467.

10 Peyser v. McCormack, 7 Hun, 303.

11 Dupre v. Rein, 7 Abb. N. C. 256.

12 Dupre v. Rein, 7 Abb. N. C. 256.

13 Memphis Medical College v. Newton, 2 Handy, 163; Wyant v. Wyant, 33 Ind. 43; Mull v. McKnight, 67 Ind. 525; Hopper v. Lucas, 86 Ind. 43.

§ 29. **Pleading private statutes.**—Courts are bound to take judicial notice of a general or public statute, and the public laws of a State need not therefore be pleaded.¹ But a private or special statute will not be judicially noticed by the court, unless it be specially pleaded.² Though it is said, that a private statute which is recognized in a public act need not be specially pleaded, but will be judicially noticed.³ In pleading a private statute, or a right derived therefrom, it is in general sufficient to refer to the statute by its title and the day of its passage,⁴ or to designate it in some other manner with convenient certainty, without setting forth any of its contents.⁵ A city ordinance will not be judicially noticed,⁶ and it has been held, that where it becomes necessary to plead a city ordinance, a mere reference to it by number, title, and date of enactment is not sufficient;⁷ and that it must be set forth in the pleading as any other fact of which the courts take no judicial notice.⁸ But a city court may properly take judicial notice of the ordinances of the city.⁹ Where the right of action depends upon the statute of another State, the statute must be averred in the same manner as other facts.¹⁰ And as a general rule, when any statute is pleaded which sanctions a defense or gives a right, it is sufficient, and is said to be the safest course, to follow the words of the statute.¹¹

1 § 12, *ante*; *McHarg v. Eastman*, 35 How. Pr. 205; 7 Robt. 137.

2 § 12, *ante*; *Railway Co. v. Moore*, 33 Ohio St. 384; *Bretz v. Mayor etc.* 35 How. Pr. 130; 4 Abb. Pr. N. S. 243; 6 Robt. 325.

3 *Webb v. Bidwell*, 15 Minn. 479. And see *Flanigen v. Washington Ins. Co.* 7 Pa. St. 306.

4 *Railway Co. v. Moore*, 33 Ohio St. 384; *Atchison etc. R. R. Co. v. Blackshire*, 10 Kan. 477; *Territory v. Virginia Road Co.* 2 Mont. 96.

- 5 N. Y. Code Civ. Proc. § 530.
 6 Porter v. Waring, 69 N. Y. 250; Lucker v. Commonw. 4 Bush, 440. And see § 12, *ante*.
 7 Pomeroy v. Lappens, 9 Oreg. 363.
 8 Pomeroy v. Lappens, 9 Oreg. 363. And see People v. Mayor etc. 7 How. Pr. 81; Harker v. Mayor etc. 17 Wend. 199. Compare Beman v. Tagnot, 5 Sand. 153.
 9 State v. Leiber, 11 Iowa, 407.
 10 Seymour v. Sturgess, 26 N. Y. 134; Evans v. Reynolds, 32 Ohio St. 183; Devoss v. Gray, 22 Ohio St. 189; Throop v. Hatch, 3 Abb. Pr. 23; Roots v. Merriwether, 8 Bush, 397; Hoyt v. McNeill, 13 Minn. 390.
 11 Cole v. Jessup, 10 N. Y. 96; 10 How. Pr. 515; Ford v. Babcock, 2 Sand. 518. And see Mann v. Corrigan, 28 Kan. 194. Compare Fuqua v. Ferrell, 80 Ky. 69; Austin v. Goodrich, 49 N. Y. 286.

§ 30. **Pleading a judgment.**—In pleading a judgment, or other determination of a court, or officer of special jurisdiction, it is not necessary under the Code system to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made.¹ If that allegation is controverted, the party pleading must establish on the trial the facts conferring jurisdiction.² An averment that the judgment was duly *rendered* is not an averment that it was duly “given or made,” nor its equivalent, and is not sufficient under the above provision.³ Nor is it sufficient simply to allege that judgment was *entered*;⁴ the word “duly,” in this relation, has an essential and important meaning, and can hardly be dispensed with.⁵ So the above provisions are confined to judgments of inferior tribunals,⁶ and it is doubtful whether they have any application to foreign judgments, or judgments of the courts of sister States.⁷ And it is held, that a complaint on a foreign judgment must either aver the fact of the existence of a general jurisdiction in the court where the judgment was rendered, or of a limited jurisdiction which extended to the cause of action for which the judgment was recovered, and also that the court had or obtained jurisdiction of the person of the defendant.⁸

1 N. Y. Code Civ. Proc. § 532; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; Cal. Code Civ. Proc. § 456; *Culligan v. Studebaker*, 67 Mo. 372. Compare *Dick v. Wilson*, 10 Oreg. 490; *Jolley v. Foltz*, 34 Cal. 321; *Territory v. Cox*, 3 Mont. 197; *Jones v. Terry*, 43 Ark. 230.

2 N. Y. Code Civ. Proc. § 532; Cal. Code Civ. Proc. § 456.

3 *Young v. Wright*, 52 Cal. 407.

4 *Hunt v. Dutcher*, 13 How. Pr. 538.

5 *Hunt v. Dutcher*, 13 How. Pr. 538. And see *Livingston v. Oak-smith*, 13 Abb. Pr. 183; *Manley v. Eassiga*, 13 Hun, 288.

6 *Cruyt v. Phillips*, 7 Abb. Pr. 205; 16 How. Pr. 120. The jurisdiction of other courts is presumed and need not be alleged: *Chemung Canal Bank v. Judson*, 8 N. Y. 254.

7 *De Nobele v. Lee*, 61 How. Pr. 272; 15 Jones & S. 372; *Hollister v. Hollister*, 10 How. Pr. 532; *Karns v. Kunkle*, 2 Minn. 313; *Kronberg v. Elder*, 18 Kan. 150. But compare *Halstead v. Black*, 17 Abb. Pr. 227.

8 *McLaughlin v. Nichols*, 13 Abb. Pr. 244. Compare *Bruckman v. Taussig*, 7 Colo. 561.

§ 31. **Averment of corporate existence.**—The bringing of an action in a name, purporting to be that of a corporation, is held to be a sufficient averment of the plaintiff's corporate existence, and an allegation in the complaint or petition that the plaintiff is a corporation is not necessary.¹ The pleader is not required to allege every fact necessary to the existence of the corporation, either generally or specifically.² And even in an action by a foreign corporation, the complaint need not state the act of incorporation, or the title of the act, or date of its passage, though it is necessary to aver that it is a corporation, and to show the State or country to which it belongs;³ and so in an action against a foreign corporation.⁴ But in an action against a domestic corporation, it is not necessary to allege in the complaint that the defendant is a legally organized corporation.⁵ So, in an action against a municipal corporation, described by its corporate name, it is not necessary to aver in the complaint that the defendant is a body corporate, since the court will take judicial notice of that fact, and of the identity of the defendant as such corporation.⁶

1 *Phoenix Bank v. Donnell*, 41 Barb. 571; 40 N. Y. 410; *La Fayette Ins. Co. v. Rogers*, 30 Barb. 491; *Stanly v. Railroad*, 89 N. C. 331; *Harris v. Muskingum Manuf. Co.* 4 Blackf. 267; *Canandaigua Academy v. McKechnie*, 19 Hun, 62; 60 N. Y. 618; *Union Cement Co. v. Noble*, 15 Fed. Rep. 502; *Ryan v. Farmers' Bank*, 5 Kan. 658. But see *Devoss v. Gray*, 22 Ohio St. 153; *Smith v. Sewing Machine Co.* 23 Ohio St. 562; *Byington v. Railroad Co.* 11 Iowa, 502. In New York, in an action by or against a corporation, the complaint must aver that the plaintiff or the defendant, as the case may be, is a corporation: N. Y. Code Civ. Proc. § 1775. See *Irving Nat. Bank v. Corbett*, 10 Abb. N. C. 85; *Concordia Sav. Assoc. v. Read*, 93 N. Y. 474; *Plimpton v. Bigelow*, 3 Civ. Proc. R. 182; *Bengston v. Thingvalla Steamship Co.* 3 Civ. Proc. R. 263; 31 Hun, 96. In the absence of averment of corporate existence, and objection made by answer or otherwise, until after judgment, the defect is waived; *Spence v. Ins. Co.* 40 Ohio St. 517; *State v. Torinus*, 22 Minn. 272.

2 *State v. Stout*, 61 Ind. 143; *Washer v. Allensville etc. Turnp. Co.* 81 Ind. 73; *Powers v. Amcs*, 9 Minn. 178; *State of Wisconsin v. Torinus*, 22 Minn. 272; *Strunk v. Smith*, 36 Wis. 631; *Wilson v. Sprague Machine Co.* 55 Ga. 672; *Gillett v. American Stove Co.* 20 Gratt. 565; *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 253; *Henderson etc. R. R. Co. v. Leavell*, 16 Mon. B. 358; *Chillicothe Sav. Assoc. v. Ruegger*, 60 Mo. 218.

3 *Conn. Bank v. Smith*, 17 How. Pr. 487; 9 Abb. Pr. 163; N. Y. Code Civ. Proc. § 1775; *Gorton Steamer Co. v. Spofford*, 3 Civ. Proc. R. 116. See *Plimpton v. Bigelow*, 3 Civ. Proc. R. 182; *American etc. Machine Co. v. Moore*, 2 Dakota, 280.

4 *Conn. Bank v. Smith*, 17 How. Pr. 487; 9 Abb. Pr. 168; N. Y. Code Civ. Proc. § 1775.

5 *Stoddard v. Onondaga Annual Conference*, 12 Barb. 573; *Phoenix Bank v. Donnell*, 40 N. Y. 410; *Salem Gravel Road v. Pennington*, 62 Ind. 175; *Odd Fellows' Build. Assoc. v. Hogan*, 28 Ark. 261. In an action against a corporation in New York, the complaint must now aver that the defendant is a corporation, and must state whether it is a domestic or a foreign corporation, and if the latter, the State, country, or government by or under whose laws it was created. But it need not set forth or specially refer to any act or proceeding by or under which the corporation was created: N. Y. Code Civ. Proc. § 1775. See *Plimpton v. Bigelow*, 3 Civ. Proc. R. 182.

6 *City of Selma v. Perkins*, 68 Ala. 145; *City Council v. Wright*, 72 Ala. 411; *Lebanon v. Griffin*, 45 N. H. 563. See *Bolton v. Cleveland*, 35 Ohio St. 319.

§ 32. **Averment of representative character.**—When the plaintiff sues in a representative capacity, as executor, administrator, guardian, and the like, and his right to sue arises only from such representative character, the mere statement in the caption that he occupies such a position will not dispense with an allegation of that fact in the body of the complaint or petition.¹ The right to the character in which the party sues in such case becomes one of the facts upon which his action de-

pend, and, like other material facts, it must be alleged in the body of the pleading, and stated in an issuable form.² Thus, one who sues as executor or administrator, although he need not make profert of letters testamentary or of administration, must aver in a direct and issuable form that he is an executor or administrator.³ So, where plaintiffs sue as partners, their right to sue as such depends upon the existence of a partnership, which, therefore, is an issuable fact, and must be alleged in the body of the complaint.⁴ Where one sues as executor, he must aver his appointment and title as such in particular,⁵ or where an action is brought to recover a debt due or from a testator, an allegation is necessary, showing the appointment of the executor or administrator as such, with all the necessary details to make that fact apparent.⁶ But in an action upon an instrument given by an executor or administrator as such, it is unnecessary to allege the time and manner of his appointment.⁷ It is sufficient simply to allege that the defendant is executor, etc.⁸

1 *Bischoff v. Blease*, 20 S. C. 460; *Hallett v. Harrower*, 23 Barb. 537; *Grantman v. Thrall*, 44 Barb. 173; *Bangs v. McIntosh*, 23 Barb. 592; *Dayton v. Connah*, 18 How. Pr. 328; *Meara v. Holbrook*, 20 Ohio St. 137; *Mansean v. Mueller*, 45 Wis. 430. And see § 9, *ante*.

2 *Bischoff v. Blease*, 20 S. C. 460; *Forrest v. Mayor etc.* 13 Abb. Pr. 350. If the capacity in which the plaintiff sues appears in the body of the complaint, it is sufficient though it does not appear in the title; *Cordier v. Thompson*, 8 Daly, 172. And see *Stilwell v. Carpenter*, 62 N. Y. 639; 2 Abb. N. C. 238; *State v. Bartlett*, 68 Mo. 531; *Patterson v. Copeland*, 52 How. Pr. 460.

3 *Chamberlain v. Tiner*, 31 Minn. 371; *Beers v. Shannon*, 73 N. Y. 232; *Fowler v. Westervelt*, 17 Abb. Pr. 53; 40 Barb. 374; *Gillmore v. Morris*, 13 Mo. App. 114; *Sheldon v. Hoy*, 11 How. Pr. 11; *Headlee v. Cloud*, 51 Mo. 301; *Mayes v. Turley*, 60 Iowa, 407; *Eans v. Exchange Bank*, 79 Mo. 182.

4 *Bischoff v. Blease*, 20 S. C. 460. And see *Hancock v. Hintrager*, 60 Iowa, 374.

5 See *Kingsland v. Stokes*, 58 How. Pr. 1; 61 How. Pr. 434; *Dial v. Tappan*, 20 S. C. 167; *Wheeler v. Dakin*, 12 How. Pr. 537.

6 *Kingsland v. Stokes*, 61 How. Pr. 404. Compare *Sheldon v. Hoy*, 11 How. Pr. 11; *Harte v. Houchin*, 50 Ind. 327; *Halleck v. Mixer*, 16 Cal. 374; *Lucas v. Todd*, 28 Cal. 182; *Dial v. Tappan*, 20 S. C. 167; *Gutridge v. Vanatta*, 27 Ohio St. 366.

7 *Kingsland v. Stokes*, 61 How. Pr. 494; *Kingsland v. Borst*, 14 N. Y. Week. Dig. 114; 26 Hun, 153; *Skelton v. Scott*, 18 Hun, 375. And see *Yates v. Hoffman*, 5 Hun, 113; *Austin v. Munroe*, 4 Lans. 67; 47 N. Y. 360.

8 *Holliday v. Fletcher*, 2 Raym. Ld. 10, 15. And see *Mattison v. Childs*, 5 Colo. 78.

§ 33. **Demand of relief or judgment.**—The plaintiff, in his complaint or petition, is to demand the relief or judgment¹ to which he supposes himself entitled; but this demand constitutes no part of the issues to be tried.² He is not confined to one kind of relief, but may demand any kind of relief to which he supposes himself entitled, the defendant having nothing to do with the form of the relief demanded.³ And a plaintiff should not be turned out of court when an answer has been interposed, because he has prayed for too much or too little, or for wrong relief.⁴ But the relief to be granted must be consistent with the case made by the complaint.⁵ And no recovery can be had upon a cause of action not pleaded, even where issue is joined and a trial had.⁶ It is proper to unite in the same action legal and equitable grounds of relief,⁷ provided they are not inconsistent with each other.⁸ Thus, both a reformation of a contract, and final judgment on the merits of the controversy, may be had in the same action.⁹ So a prayer for a perpetual injunction against the repetition of an act may properly be joined with a claim for damages caused by such act.¹⁰ And the fact that the plaintiff has demanded judgment for a sum of money by way of damages, does not preclude the recovery of the same amount by way of equitable relief, if the facts entitle the plaintiff to such relief.¹¹ The relief demanded in the complaint does not necessarily characterize the action, or limit the plaintiff's remedy.¹² So it is held that alternative relief may be prayed in some cases;¹³ and a complaint is not obnoxious to a motion to make more definite and certain, merely

because it demands relief in the alternative.¹⁴ Where a complaint or petition states a good legal ground of action, it does not become an equity action merely because the prayer improperly asks for equitable relief, and that part of the pleading relating to the remedy, if separately stated, should be rejected as surplusage.¹⁵ If the allegations of the complaint warrant legal relief only, the plaintiff cannot have equitable relief upon the evidence.¹⁶ And where the allegations and prayer of the complaint are addressed exclusively to the equitable cognizance of the court, and do not disclose a cause of action for legal redress, and there is a failure of allegations to entitle the plaintiff to equitable relief, the complaint should be dismissed.¹⁷

1 See N. Y. Code Civ. Proc. § 481, subd. 3.

2 *Hall v. Hall*, 38 How. Pr. 97; *Hiatt v. Parker*, 29 Kan. 771; *Culver v. Rogers*, 33 Ohio St. 546.

3 *Hall v. Hall*, 38 How. Pr. 97. And see *Armitage v. Pulver*, 37 N. Y. 494; *Bradley v. Aldrich*, 40 N. Y. 504.

4 *Murtha v. Curley*, 90 N. Y. 372; 12 Abb. N. C. 12; 3 Civ. Proc. R. 1. Where the defendant answers, the court may give such relief as the parties are entitled to, whether demanded in the complaint or not: *Armitage v. Pulver*, 37 N. Y. 494; *Jones v. Butler*, 20 Barb. 641; 20 How. Pr. 189; *Marquat v. Marquat*, 12 N. Y. 356; *Hopkins v. Lane*, 2 Hun, 38; *Mackey v. Auer*, 8 Hun, 180. And see *Hamilton v. Miller*, 31 Ohio St. 87. But the plaintiff cannot, in the absence of an answer, have any relief not demanded in the complaint: *Stinson v. Blake*, 20 How. Pr. 484; 12 Abb. Pr. 331; *Peck v. N. Y. ex R. R. Co.* 59 How. Pr. 419; 22 Hun, 129; 85 N. Y. 246; *Bartlett v. Holmes*, 12 Hun, 306; 75 N. Y. 528.

5 *Bradley v. Aldrich*, 40 N. Y. 504; *Graham v. Head*, 57 N. Y. 681; *Cowenhoven v. City of Brooklyn*, 38 Barb. 9; *Brown v. Balde*, 2 Lans. 383; 57 N. Y. 286; *Short v. Barry*, 40 How. Pr. 210; 58 Barb. 177; *Boardman v. Davidson*, 7 Abb. N. S. 438.

6 *Fisk Pavement & Flagging Co. v. Evans*, 5 Jones & S. 482. And see *Bailey v. Ryder*, 10 N. Y. 363; *Saltus v. Genin*, 7 Abb. Pr. 193; 3 Bosw. 250; *Atwood v. Lynch*, 5 Jones & S. 5; *Southwick v. First Nat. Bank*, 84 N. Y. 420.

7 *Lattin v. McCarty*, 41 N. Y. 107; *New York Ice Co. v. Insurance Co.* 21 How. Pr. 296; 23 N. Y. 357; *Steinberger v. McGovern*, 15 Abb. Pr. N. S. 257; 56 N. Y. 12; *Fairchild v. Lynch*, 10 Jones & S. 265; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 118.

8 *Young v. Edwards*, 11 How. Pr. 211; *Linden v. Hepburn*, 5 How. Pr. 188; 3 Sand. 668.

9 *Guernsey v. Am. Ins. Co.* 17 Minn. 104; *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263; *Laub v. Buckmiller*, 17 N. Y. 620; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 118.

10 *Getty v. Hudson River R. R. Co.* 6 How. Pr. 239. And see *Converse v. Hawkins*, 21 Ohio St. 209.

11 *Hale v. Omaha Nat. Bank*, 49 N. Y. 626.

12 *Corry v. Gaynor*, 21 Ohio St. 230; *Rindge v. Baker*, 57 N. Y. 209; 15 Am. Rep. 475; *Williams v. Slote*, 70 N. Y. 601; *Reed v. Reed*, 25 Ohio St. 422. Compare *Lowber v. Connit*, 36 Wis. 176.

13 *Young v. Edwards*, 11 How. Pr. 201; *Linden v. Hepburn*, 5 How. Pr. 188; 3 Sand. 668. And see *Rogers v. Brooks*, 30 Ark. 612; *Riddle v. Roll*, 24 Ohio St. 572. But it has been held that a demand for relief in the alternative is improper: *Durrant v. Gardner*, 13 How. Pr. 94; 10 Abb. Pr. 445.

14 *Lyke v. Post*, 65 How. Pr. 298. A prayer for relief in the alternative is generally permissible in equity, where the plaintiff has doubts as to how much relief, or what kind of relief, he is entitled to: *Hiatt v. Parker*, 29 Kan. 765.

15 *Brown v. Home Savings Bank*, 5 Mo. App. 1. And see *Brunbridge v. Goydlove*, 30 Ohio St. 374; *Williams v. Slote*, 70 N. Y. 601.

16 *Stevens v. Mayor etc.* 84 N. Y. 296.

17 *De Bussiere v. Holladay*, 4 Abb. N. C. 111. And see *Town of Venice v. Woodruff*, 62 N. Y. 462; *Wilder v. Ranney*, 16 N. Y. Week. Dig. 478. Compare *Steinberger v. McGovern*, 56 N. Y. 22; 15 Abb. Pr. N. S. 257.

§ 34. **Verification.**—The verification is no part of a pleading,¹ and if a pleading which is required by statute to be verified by affidavit is not so verified, and the opposite party accepts it, without objection on that account, and takes issue of law or fact upon it, the objection will be considered as waived.² It is too late to raise the objection for the first time in the court of review.³ If the verification of a complaint or petition be defective, and objection is made by the proper motion, it is the duty of the court to require the pleading to be verified as required by law;⁴ but the defect may be waived, and will be deemed waived where no objection is made until after the rendition of the judgment.⁵ In New York it is optional with the pleader whether he will make oath to the allegations of the complaint or not.⁶ But when any pleading is verified, every subsequent pleading, except a demurrer, or the general answer of an infant by his guardian *ad litem*, must also be verified.⁷ Generally speaking, the pleading should be verified by the party,⁸ his agent or attor-

ney,⁹ or when a corporation is the party, by an officer thereof,¹⁰ its agent or attorney.¹¹ When the State, or any officer thereof in its behalf, is the party, the verification may be made by any person acquainted with the facts.¹² When the pleading is verified by any person other than the party, he must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge, and the reason why it is not made by the party.¹³ As generally prescribed, the verification of a pleading must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.¹⁴ The form thus prescribed need not be literally followed, provided there is a substantial compliance.¹⁵ There are two ways of making the allegations in a pleading, one of which is absolute or unqualified, and the other qualifiedly upon information and belief.¹⁶ And the verification is only required to be adapted to the mode of statement in the pleading;¹⁷ if the mode of statement is absolute, then the verification should be absolute, but if the mode of statement is qualified, then the verification should be qualified.¹⁸ Thus, where all the allegations in the pleading are positive, and none of them stated to be on information and belief, a verification that the pleading is true to the deponent's knowledge is a sufficient verification.¹⁹ On the other hand, where all the allegations of a complaint are stated to be on information and belief, it is a sufficient verification that the complaint is true, as the affiant is informed and believes.²⁰ If the allegations of a pleading are made partly on personal knowledge and partly on information and belief, the full form of verification prescribed should be used.²¹ The true construction of the verification in such case is, that so far as the

matters in the pleading are within the deponent's knowledge, they are true, and as to the residue, he is either informed or believes them to be true.²² A verification of an insufficient pleading will not aid it,²³ nor prevent its being stricken out as sham.²⁴

1 *George v. McAvoy*, 6 How. Pr. 200. And see *State Bank of Olean v. Shaw*, 5 Hun, 114.

2 *Dawson v. Vaughn*, 42 Ind. 395; *Pudney v. Burkhart*, 62 Ind. 179; *Butler v. Church*, 14 Bush, 540; *Hughes v. Feeter*, 18 Iowa, 142. And see *State v. Bath*, 21 Kan. 583.

3 *Payne v. Flournoy*, 29 Ark. 500.

4 *Dorrington v. Meyer*, 8 Neb. 211, 214. A defect in a verification of a petition for divorce is not jurisdictional: *Ellis v. White*, 61 Iowa, 644.

5 *Dorrington v. Meyer*, 8 Neb. 214. And see *Hayward v. Grant*, 18 Minn. 165; *Wilson v. Bennett*, 2 Civ. Proc. R. 34; *Schwarz v. Oppold*, 74 N. Y. 307; *Harris v. Ray*, 15 Mon. B. 690. And the courts lean against objections on the ground of insufficient verification: *Wilkin v. Gilman*, 13 How. Pr. 225. Compare *Knowles v. Fritz*, 83 Wis. 216.

6 See Code Civ. Proc. § 523; *Strauss v. Parker*, 9 How. Pr. 342; *Quin v. Tilton*, 2 Duer, 648.

7 Code Civ. Proc. § 523. And see *Hempstead v. Hempstead*, 7 How. Pr. 8; *Winne v. Sickles*, 9 How. Pr. 217; *Crompton v. Crow*, 2 Utah, 245; *Reynolds v. Smothers*, 87 N. C. 24. The answer in an action for libel need not be verified, although the complaint be verified: *Wilson v. Bennett*, 2 Civ. Proc. R. 34. See further as to when verification may be omitted: N. Y. Code Civ. Proc. § 523; *Molony v. Dows*, 15 How. Pr. 261; 2 Hilt. 247; *Fredericks v. Taylor*, 14 Abb. Pr. N. S. 77; 62 N. Y. 596.

8 See *Taber v. Gardner*, 6 Abb. N. S. 147; *Gray v. Kendall*, 10 Abb. Pr. 66; 5 Bosw. 666.

9 *Boston Locomotive Works v. Wright*, 15 How. Pr. 253; *Drevert v. Appert*, 2 Abb. Pr. 165; *Gillet v. Houghton*, 8 Wis. 311; *Johnson v. Maxwell*, 87 N. C. 18; N. Y. Code Civ. Proc. § 525. Compare *Purdon v. Carrington*, 31 Ohio St. 168; *Peyser v. McCormack*, 51 How. Pr. 205; 7 Hun, 300.

10 *Glaubensklee v. Hamburg etc. Packet Co.* 9 Abb. Pr. 104; N. Y. Code Civ. Proc. § 525, subd. 1; *Bank v. Hutchison*, 87 N. C. 22.

11 N. Y. Code Civ. Proc. § 525, subd. 3; *Market Nat. Bank v. Hogan*, 21 Wis. 317. And see *Hixon v. George*, 18 Kan. 283.

12 N. Y. Code Civ. Proc. § 525, subd. 2.

13 N. Y. Code Civ. Proc. § 526; *Treadwell v. Fassett*, 10 How. Pr. 184; *Fitch v. Bigelow*, 5 How. Pr. 237; *Lyons v. Murat*, 54 How. Pr. 23; *Smith v. Mulliken*, 2 Minn. 319; *Cropsey v. Wiggenhorn*, 3 Neb. 108; *Hyde v. Saig*, 15 N. Y. Week. Dig. 211; 27 Hun, 369. A verification to a complaint made by an officer of a corporation need not set forth the reasons why it was not made by the party: *Bank v. Hutchison*, 87 N. C. 22.

14 See N. Y. Code Civ. Proc. § 526.

15 *Waggoner v. Brown*, 8 How. Pr. 212; *Sexaner v. Bowen*, 3 Daly, 405; 10 Abb. Pr. N. S. 355; *Tibballs v. Selfridge*, 12 How. Pr. 64; *Radway v. Mather*, 5 Sand. 654.

16 Harnes v. Tripp, 4 Abb. Pr. 232; Orvis v. Goldschmidt, 64 How. Pr. 71; 2 Civ. Proc. R. 314.

17 Orvis v. Goldschmidt, 64 How. Pr. 71; 2 Civ. Proc. R. 314. And see Kinkaid v. Kipp, 1 Duer, 692; Ladue v. Andrews, 54 How. Pr. 160.

18 Orvis v. Goldschmidt, 64 How. Pr. 71; 2 Civ. Proc. R. 314.

19 Kinkaid v. Kipp, 1 Duer, 692. And see Crane v. Wiley, 14 Wis. 658; Market Nat. Bank v. Hogan, 21 Wis. 317.

20 Orvis v. Goldschmidt, 2 Civ. Proc. R. 314; 64 How. Pr. 71. See as to cases of defective verification: Tibballs v. Selfridge, 12 How. Pr. 64; Sexaner v. Bowen, 3 Daly, 405; 10 Abb. Pr. N. S. 335; Williams v. Riel, 5 Duer, 601; 11 How. Pr. 374; Stadler v. Parmlee, 10 Iowa, 23.

21 See N. Y. Code Civ. Proc. § 528; Truscott v. Dole, 7 How. Pr. 221.

22 Truscott v. Dole, 7 How. Pr. 221.

23 Farrington v. Wright, 1 Minn. 241.

24 Hayward v. Grant, 13 Minn. 165; Conway v. Wharton, 12 Minn. 158.

‡ 35. **Formal parts of.**—The complaint or petition should be written in ink or printed on paper or parchment,¹ in the English language.² The statements may be commenced in any simple and direct form, as, for instance, “the plaintiff complains and alleges,” or “the plaintiff states,” and the like.³ Matters of inducement merely, as that the plaintiffs or defendants are husband and wife, are not of the *gravamen* of the action, and properly precede the statement of any cause of action.⁴ And such matters of inducement, having been set out in the first count of the complaint, need not and should not be repeated, but merely referred to in the subsequent counts, although the subsequent counts are for distinct causes of action.⁵ When a complaint or petition contains more than one cause of action, each should be distinctly stated in a separate paragraph and plainly numbered.⁶ And each claim must not only stand by itself, but must be complete in itself.⁷ But if there be two causes of action stated in one paragraph, and the plaintiff proves one, he may recover for that without proving the other.⁸ Any mode of separating the several causes of action, which apprises the defendant of what is intended, would appear to be sufficient.⁹ They may

be distinguished by the phrase, "and for a further cause of action," etc., or some other equivalent words.¹⁰ If distinct causes of action are not separated, motion, and not demurrer, is the proper remedy.¹¹ The motion is to make the complaint or petition more definite and certain.¹² Every pleading, including a complaint or petition, is required to be subscribed by the party or his attorney.¹³ The subscription may be either written or printed;¹⁴ and it is held that the signature of the party to the verification is a sufficient subscription to the pleading.¹⁵ In practice, the attorney usually subscribes the pleading, and in New York, it is now provided that a pleading must be subscribed by the attorney for the party.¹⁶ A pleading served without having been subscribed should be returned with notice of the defect,¹⁷ and it must be promptly returned or the defect will be waived.¹⁸ It was not required that the declaration in common-law pleading should state the time when the suit was commenced, and it is not required in a complaint or petition under the Code system.¹⁹ No injury can accrue from its omission, since, if the action was in fact commenced before the cause of action became due, that may be shown on the trial, and it will be a good defense.²⁰ The complaint or petition should, however, be dated, as a matter of convenience.²¹

1 See *Fall v. Presley*, 50 Ala. 342; *Bracy v. Bracy*, 12 Bush, 153; 2 Walt's Pr. 238.

2 *Dunton v. Montoyo*, 1 Colo. 99; Cal. Code Civ. Proc. § 135. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner: Cal. Code Civ. Proc. § 186.

3 2 Walt's Pr. 238; *Miller Plead. & Pr.* 140.

4 *Abendroth v. Boardley*, 27 Wis. 555.

5 *Abendroth v. Boardley*, 27 Wis. 555; *Curtis v. Moore*, 15 Wis. 134. And see *Sinclair v. Fitch*, 3 Smith, E. D. 677.

6 N. Y. Code Civ. Proc. § 483; *Boeckler v. Mo. Pacific Railway Co.* 10 Mo. App. 448, 450; *Bonney v. Reardin*, 6 Bush, 36; *Henderson v. Jackson*, 9 Abb. Pr. N. S. 293; 40 How. Pr. 168; *Parsons v. Hayes*, 4 N. Y. Law Bull. 31; *Boles v. Cohen*, 15 Cal. 152; *Sharp v. Miller*, 54 Cal. 329; *Goldberg v. Utley*, 60 N. Y. 427; *Cruver v. Railw. Co.* 62

Iowa, 460. See *Madge v. Puig*, 12 Hun, 13; *Andrews v. Alcorn*, 13 Kan. 351; *Shaffe v. Maddox*, 9 Neb. 205.

7 *Benedict v. Seymour*, 6 How. Pr. 238; *Lattin v. McCarty*, 17 How. Pr. 231; 8 Abb. Pr. 225; *National Bank v. Green*, 33 Iowa, 140; *Reiners v. Brandhorst*, 59 How. Pr. 91; *Anderson v. Speers*, 8 Abb. N. C. 382; *Krutz v. Fisher*, 8 Kan. 90; *Boeckler v. Mo. Pac. Railway Co.* 10 Mo. App. 448.

8 *Noel v. Hudson*, 13 Mon. B. 205. And see *Boyle v. City of Brooklyn*, 71 N. Y. 1; *Wetmore v. Porter*, 92 N. Y. 78.

9 *Hall v. McKechnie*, 22 Barb. 244.

10 *Benedict v. Seymour*, 6 How. Pr. 298; *Natoma Water Co. v. Clarkin*, 14 Cal. 547. See *Pike v. Van Wormer*, 5 How. Pr. 171; *Durkee v. Saratoga etc. R. R. Co.* 4 How. Pr. 228.

11 *Everett v. Waymire*, 30 Ohio St. 314; *Freer v. Denton*, 61 N. Y. 423; *Bass v. Comstock*, 36 How. Pr. 382; 38 N. Y. 21; *Gardner v. Locke*, 2 Civ. Proc. R. 252; *Williams v. Langford*, 15 Mon. B. 569. Compare *Watson v. Railroad Co.* 50 Cal. 523.

12 *Commercial Bank v. Pfeiffer*, 22 Hun, 327; *Colton v. Jones*, 7 Robt. 164, 643.

13 Cal. Code Civ. Proc. § 446; *Dixey v. Pollock*, 8 Cal. 572. An agent with power of attorney cannot subscribe: *Wier v. Slocum*, 3 How. Pr. 377.

14 *Hancock v. Bowman*, 49 Cal. 413; *Mut. Life Ins. Co. v. Ross*, 10 Abb. Pr. 260, n.

15 *Hubbell v. Livingston*, 1 Code R. 63. And see *Conn. v. Rhodes*, 26 Ohio St. 644.

16 N. Y. Code Civ. Proc. § 520.

17 *Ehle v. Haller*, 10 Abb. Pr. 287; 6 Bosw. 661. See *Peckham v. Smith*, 9 How. Pr. 441; *Fritz v. Barnes*, 6 Neb. 435; *Gulf Railroad v. Owen*, 8 Kan. 409.

18 *Strauss v. Parker*, 9 How. Pr. 342; *Anderson v. Gurley*, 4 N. Y. Law Bull. 18.

19 *Smith v. Holmes*, 19 N. Y. 271; *Maynard v. Talcott*, 11 Barb. 569.

20 *Maynard v. Talcott*, 11 Barb. 569.

21 See 2 *Wait's Pr.* 301.

§ 36. **Separate counts or statements for a single cause of action.**—A cause of action is defined to be that right to a remedy which the law gives to a party injured by the wrongful act of another.¹ The breach of duty is substantially the cause of action.² Each cause of action is to be construed as a distinct pleading, and must stand or fall by itself.³ And it is an established rule of Code pleading, that facts which constitute a single cause of action cannot be subdivided into two or more counts or statements.⁴ The Code system requires the pleading of a cause of action to be reduced to a plain

and concise statement of the facts constituting the cause of action, without unnecessary repetition.³ Since there can be but one substantially true statement of a single cause of action, the practice of setting it forth in different counts, as at common law, is necessarily abolished.⁶ Still, the court may allow the use of separate counts if a good reason exists for it.⁷ And when there really exists two distinct and separate grounds for claiming the relief demanded in the complaint, and the plaintiff states each one therein separately and plainly, or where he is uncertain as to the exact ground of recovery the proof may afford, he may frame a complaint for the recovery of a single claim in several distinct counts or statements, and the court will not compel him to elect between them.⁸ But generally speaking, if a plaintiff has really but one cause of action, and he sets it forth in several counts, he may on motion be compelled to elect upon which he will rely.⁹ If it appears from the face of the pleading that several counts therein are really for but one and the same cause of action, no affidavit or other proof is required;¹⁰ but the rule is otherwise where this is not apparent from an inspection of the face of the pleading.¹¹ In the latter case, the court must be satisfied by affidavit or other proof that the several statements of causes of action are but for one and the same cause, in order to warrant an order compelling an election or to strike out.¹² If two distinct causes of action have been set forth in a complaint, it cannot be inferred that there is only a single cause of action, merely from the circumstances that the amounts claimed are precisely the same, and that the demand of judgment is but for the one sum.¹³

1 *Cumberland Canal Co. v. Sherman*, 30 Barb. 159; 8 Abb. Pr. 243; *Graham v. Scripture*, 26 How. Pr. 501; *Meyer v. Van Collem*, 28 Barb. 230, 231; *Bank of Commerce v. Rutland etc. R. R. Co.* 10 How. Pr. 1; 2 *Walt's Pr.* 353.

2 Bank of Commerce v. Rutland etc. R. R. Co. 10 How. Pr. 1. Compare Scarborough v. Smith, 18 Kan. 406.

3 Swift v. Kingsley, 24 Barb. 541; Boeckler v. Mo. Pac. Railway Co. 10 Mo. App. 448; Krutz v. Fisher, 8 Kan. 90; Potter v. Earnest, 45 Ind. 416; Silvers v. Railroad Co. 43 Ind. 445; Clarke v. Iron Co. 9 Mo. App. 446; Victory Webb Manuf. Co. v. Beecher, 55 How. Pr. 193; Summit Co. Bank v. Smith, 1 Handy, 575; Haskell v. Haskell, 54 Cal. 262.

4 Ford v. Mattice, 14 How. Pr. 91; Birdseye v. Smith, 32 Barb. 221; Ferguson v. Gilbert, 16 Ohio St. 88. And see § , *ante*.

5 Roberts v. Leslie, 14 Jones & S. 76. And see Leitenstorfer v. King, 7 Colo. 436.

6 Fern v. Vanderbilt, 13 Abb. Pr. 72; Nash v. McCauley, 9 Abb. Pr. 159; Sturges v. Burton, 8 Ohio St. 218.

7 Jones v. Palmer, 1 Abb. Pr. 442; Stearns v. Dubois, 55 Ind. 257. Under the Iowa Code, the same cause of action may be stated in different counts and in different forms: Van Brunt v. Mather, 48 Iowa, 503.

8 Velle v. Newark City Ins. Co. 65 How. Pr. 1; 12 Abb. N. C. 309; 3 Civ. Proc. R. 282; Longprey v. Yates, 31 Hun, 432; Wilson v. Smith, 61 Cal. 209. And see Talcot v. Van Vechten, 25 Hun, 565.

9 Young v. Edwards, 11 How. Pr. 201; Curtis v. Buckley, 14 Kan. 449; Hillman v. Hillman, 14 How. Pr. 456; Sturges v. Burton, 8 Ohio St. 215; Comstock v. Hoeft, 1 N. Y. Law Bull. 43. See Hentig v. Kansas Loan & Trust Co. 28 Kan. 617, 620.

10 Ford v. Mattice, 14 How. Pr. 91. The mere fact that a complaint is divided into several paragraphs, each separately numbered, is alone insufficient to identify them as distinct counts, relating to different causes of action: Merrill v. Dearing, 22 Minn. 376. See Welch v. Platt, 32 Hun, 194; 19 N. Y. Week. Dig. 265.

11 Dickens v. N. Y. etc. R. R. Co. 13 How. Pr. 228; Lackey v. Vanderbilt, 10 How. Pr. 155.

12 Dickens v. N. Y. etc. R. R. Co. 13 How. Pr. 228; Dunning v. Thomas, 11 How. Pr. 231. And see Cheney v. Fisk, 22 How. Pr. 83.

13 Carney v. Bernheimer, 3 N. Y. Law Bull. 22.

§ 37. Joinder of causes of action.—As it respects the joinder of several causes of action under the Code system of pleading, it is announced as a general principle that where different causes of action are of the same character, and between the same parties litigant, and the joinder thereof is convenient to them, the court will usually refuse to entertain an objection to the joinder.¹ The plaintiff may unite, in the same complaint or petition, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, and they may be enforced in the same action,

if otherwise consistent with the rules prescribed for the joinder of actions.² So, the provision of the Code permitting the plaintiff to unite in one action, all causes of action arising from the same transaction or transactions connected with the same subject of action, includes causes of action *ex contractu* and *ex delicto*;³ but if the causes of action do not arise from the same transaction or transactions connected with the same subject of action, then causes of action *ex contractu* cannot, in general, be united with causes of action *ex delicto*.⁴ Causes of action arising out of contract, express or implied, and affecting all the parties, may clearly be joined;⁵ but this rule is to be taken in connection with the rule that only such causes of action can be joined as are consistent with each other.⁶ Those arising on contract, but inconsistent with each other, cannot be joined.⁷ And causes of action generally, which do not affect the same parties, cannot be joined.⁸ Thus, a cause of action against one defendant, and another cause of action against the same defendant and the defendant pleaded with him, both causes of action being for damages for false representations, cannot be properly joined.⁹ So, another requisite to the joinder of several causes of action is, that those united in the same complaint or petition must not require different places of trial.¹⁰ And the facts showing that the several causes of action united arose out of the same transaction, should be set forth in the complaint, so that the court may see that the joinder is proper.¹¹ Subject to the general rules above stated, a cause of action for false imprisonment, and one for malicious prosecution, when both arise out of the same transaction, may be joined;¹² so, an action for assault and battery may be joined with one for false imprisonment,¹³ or for any other injury to the person;¹⁴ so, causes of action for slander, libel, and

malicious prosecution may be joined ;¹⁵ so, trespass to the person and to property, arising out of the same transaction, are joinable ;¹⁶ so, a cause of action on a contract, and for fraud or negligence directly connected with the contract, may be joined ;¹⁷ and it was held, that a cause of action for an injury to a horse by excessive driving was properly joined with one for conversion of a horse.¹⁸ Several causes of action arising out of claims to recover real property, with or without damages for the withholding thereof, may be united in the same complaint.¹⁹ Causes of action for the recovery of real property, for the value of the rents and profits, and for the partition of such real property, may be joined.²⁰ And joinder of causes of action for the partition of real and of personal property is allowed.²¹ In respect to *qui tam* or popular actions, given by statute for the recovery, in whole or in part, of forfeitures or penalties, it is held that several causes of action for penalties under the statute may be united in the same complaint or petition.²² But it was held that an action for a statutory penalty for exacting excessive fare, and for personal injuries in ejecting the passenger from the cars on a subsequent trip, on the same day, could not be properly joined.²³ A claim for damages sustained by reason of a failure to enter satisfaction of an extinguished encumbrance, and a claim for the penalty for failure to enter satisfaction, are separate causes of action, and should be set out in separate counts, but may be joined in the same petition.²⁴ Although a plaintiff may have both legal and equitable relief in the same action, yet the two kinds of relief must be consistent with each other,²⁵ and this rule is held to be violated where an action is brought to recover a statute penalty for violating a city ordinance, and to enjoin a continuance of the violation.²⁶

1 *King v. Farmer*, 88 N. C. 22. And see *Young v. Young*, 81 N. C. 91.

2 *Gridley v. Gridley*, 24 N. Y. 130; *Lattin v. McCarty*, 41 N. Y. 107; N. Y. Code Civ. Proc. § 484; *Gray v. Dougherty*, 25 Cal. 263; *Beck v. Allison*, 56 N. Y. 366; *Montgomery v. McEwen*, 7 Minn. 351; *Wilder v. Ranney*, 16 N. Y. Week. Dig. 478; *Welch v. Platt*, 32 Hun, 194.

3 See N. Y. Code Civ. Proc. § 484; *Barr v. Shaw*, 10 Hun, 580; *Henderson v. Jackson*, 40 How. Pr. 168; 9 Abb. Pr. N. S. 233; 2 Sweeny, 324; *Anderson v. Hill*, 53 Barb. 238; *Jones v. Steamer Cortez*, 17 Cal. 497; *Harris v. Avery*, 5 Kan. 146; *Sturges v. Burton*, 8 Ohio St. 218; *De Witt v. McDonald*, 59 How. Pr. 411; *Polley v. Wilkisson*, 5 Civ. Proc. R. 135.

4 *Sturges v. Burton*, 8 Ohio St. 218; *Jones v. Johnson*, 10 Bush, 649; *Henshaw v. Noble*, 7 Ohio St. 226; *Berry v. Carter*, 19 Kan. 135. A cause of action arising from tort may be joined with one arising on contract, if they are between the same parties, in the same right, and have the same venue: *Turner v. First Nat. Bank*, 26 Iowa, 562. Where a complaint states a cause of action *ex delicto*, no recovery can be had upon a cause of action *ex contractu* not embraced in such statement: *Minneapolis Harvester Works v. Smith*, 30 Minn. 399.

5 *Bank of British America v. Suydam*, 6 How. Pr. 379; *Stewart v. Balderston*, 10 Kan. 131; *Gridley v. Gridley*, 24 N. Y. 130; *Vogler v. World Mut. L. Ins. Co.* 51 How. Pr. 301.

6 *Smith v. Hallock*, 8 How. Pr. 73; *Brown v. Ashbough*, 40 How. Pr. 226.

7 *Nichols v. Drew*, 94 N. Y. 22, 26.

8 *Hess v. Buffalo etc. R. R. Co.* 27 Barb. 391; *St. Joseph's Orphan Asylum v. Wolpert*, 80 Ky. 86; *Pulen v. Reynolds*, 22 How. Pr. 353; *Howse v. Moody*, 14 Fla. 59; *Turner v. Duchman*, 23 Wis. 500; *North Carolina Land Co. v. Beatty*, 69 N. C. 329; *Johnson v. Kirby*, Sup. Ct. Cal. 3 West C. Rep. 482; *Enos v. Thomas*, 4 How. Pr. 48. But it is not necessary that all the parties should be *equally* affected: *Earle v. Scott*, 50 How. Pr. 566; *Vermeule v. Beck*, 15 How. Pr. 333.

9 *Pracht v. Rlitter*, 16 Jones & S. 509.

10 *Hackett v. Carter*, 38 Wis. 394; *Dewer v. Ward*, 12 How. Pr. 419.

11 *Flynn v. Bailey*, 50 Barb. 73. And see *Polley v. Wilkisson*, 5 Civ. Proc. R. 135.

12 *Barr v. Shaw*, 10 Hun, 580; *Krug v. Ward*, 77 Ill. 603. And see *Castro v. Uriarte*, 2 Civ. Proc. R. 210. But see *Nebenzahl v. Townsend*, 61 How. Pr. 353; 10 Daly, 232.

13 *Wiley v. Keokuk*, 6 Kan. 94; *Cahill v. Terrio*, 55 N. H. 571.

14 *Home v. Peckham*, 6 How. Pr. 225; 10 Barb. 656.

15 *Watts v. Hilton*, 3 Hun, 606; *Hull v. Vreeland*, 42 Barb. 543; 18 Abb. Pr. 182; *Shore v. Smith*, 15 Ohio St. 173; *Brown v. Rice*, 51 Cal. 483. And see *Harris v. Avery*, 5 Kan. 146.

16 *Holmes v. Sheridan*, 1 Dill. 351.

17 *Jones v. Johnson*, 10 Bush, 649. And see *Badger v. Benedict*, 1 Hilt. 414; 4 Abb. Pr. 176. Compare *Graves v. Walte*, 50 N. Y. 156.

18 *Summerville v. Metcalf*, 15 N. Y. Week. Dig. 154. See *Silver v. Holden*, 18 Jones & S. 236.

19 N. Y. Code Civ. Proc. § 484; *Vandevoort v. Gould*, 36 N. Y. 639; *Sternberger v. McGovern*, 56 N. Y. 12; 15 Abb. Pr. N. S. 257; *Van Alstine v. McCarty*, 51 Barb. 326; *McKinney v. McKinney*, 8 Ohio St. 423; *Perry v. Richardson*, 27 Ohio St. 110.

20 *Scarborough v. Smith*, 18 Kan. 309. And see *Morrill v. Dearing*, 22 Minn. 376; *Black v. Drake*, 23 Kan. 432. A cause of action for trespass upon land may be united with a cause of action for conversion of personal property, where they both arise out of the same transaction: *Polley v. Wilkisson*, 5 Civ. Proc. R. 135.

21 *Prentice v. Janssen*, 7 Hun, 86.

22 *Grover v. Morris*, 73 N. Y. 473, 479. But see *Brown v. Rice*, 51 Cal. 439.

23 *Sullivan v. New York etc. R. R. Co.* 1 Civ. Proc. R. 235; 19 Blatchf. 383. And compare *Wiles v. Suydam*, 64 N. Y. 173. But see *Railroad Co. v. Cole*, 29 Ohio St. 126; *Railroad Co. v. Moore*, 33 Ohio St. 384; *Railroad Co. v. Cook*, 37 Ohio St. 265.

24 *Scott v. Robards*, 67 Mo. 289.

25 *Linden v. Hepburn*, 5 How. Pr. 183.

26 *Lamport v. Abbott*, 12 How. Pr. 340. The law does not require that legal and equitable causes of action shall be united, even when they arise out of the same transaction, or are connected with the subject of the action. It is a privilege conferred upon the plaintiff, which he may avail himself of or not, solely at his own election: *Bruce v. Kelly*, 5 Hun, 229.

§ 38. What constitutes a single cause of action.—Since the law, in order to prevent vexatious or oppressive legislation, forbids the splitting up of one single or entire cause of action into parts, and the bringing of separate actions for each, it becomes important to ascertain when the causes of action are identical, or what is to be deemed a single or entire demand within the meaning of the authorities.¹ The distinction usually made between demands or rights of action which are single and entire, and those which are several and distinct, is that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts.² In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be;³ and in respect to contracts, express or implied, each contract affords one and only one cause of action.⁴ Nor does the case of a contract, containing several stipulations to be performed at different times, constitute any exception to the rule;⁵ for although an action may be maintained upon each stip-

ulation as it is broken, before the time for the performance of the others, yet the ground of action is the stipulation, which is in the nature of a several contract.⁶ As a general rule, distinct contracts of sale constitute distinct causes of action.⁷ But several sales made at different times may, by agreement of parties, or by inference from circumstances, be so blended or connected as to constitute but one entire demand or cause of action;⁸ thus, it is held that all the items due on a running account for merchandise sold constitute but a single cause of action, and that a recovery in one action for a part of the items is a bar to a subsequent action for the residue.⁹ So, it is held that several claims for monthly rent, all due, cannot be split up into separate actions, and if separate actions are brought, judgment in one is a defense to the others.¹⁰ So the contract of an attorney with his client is entire, and he must include all his services in one action.¹¹ But a claim of damages for an alleged wrongful dismissal from employment, and a claim to wages earned during the time the plaintiff was actually employed, and due and payable before the wrongful dismissal, constitute separate causes of action upon which separate actions may be maintained.¹² Different acts of fraud in obtaining payment of many different fraudulent claims at different times, in pursuance of an alleged conspiracy, may be treated as a single cause of action.¹³ Loss to the plaintiff of his wife's services, and the expenditure by him of means and labor in healing and caring for himself and child, such damage being the result of the same negligent act of the defendant, constitute but a single cause of action.¹⁴ The entire conversation, in which slanderous words are published, constitutes but a single cause of action.¹⁵ The rule which forbids the splitting of an entire demand,

BOONE PLEAD. — 6.

is designed to prevent vexatious or oppressive litigation;¹⁶ and when the parties mutually agree to a division of one single demand into several, the reason of the rule no longer exists, and a judgment upon a part of the demand is no bar to an action upon the remainder.¹⁷ The holder of several past due promissory notes against the same parties may bring separate actions upon each, and a recovery in one, and satisfaction of the judgment, is not a bar to the other actions.¹⁸ And the fact that the notes were given upon settlement of one and the same demand does not make each a part of the original demand, so as to compel the bringing of a single action upon all of the notes.¹⁹ A party cannot be compelled to join in one action several distinct causes of action.²⁰

1 See *Staples v. Goodrich*, 21 Barb. 317; *Draper v. Stouvenel*, 33 N. Y. 219; *O'Beirne v. Lloyd*, 43 N. Y. 248; *Bowman v. Holladay*, 3 Oreg. 182.

2 *Secor v. Sturgis*, 16 N. Y. 548; 2 Abb. Pr. 67; *Mulford v. Hodges*, 10 Hun, 79; *Welch v. Platt*, 32 Hun, 194; 5 Civ. Proc. R. 433; 19 N. Y. Week. Dig. 265. And see *Van De Haar v. Van Domseler*, 56 Iowa, 671, 678.

3 *Sheldon v. Lake*, 40 How. Pr. 439; 9 Abb. Pr. N. S. 306; *Railroad Co. v. Chester*, 57 Ind. 297; *Filler v. Railroad Co.* 49 N. Y. 42; *Rochring v. Huebschmann*, 34 Wis. 155.

4 *Perry v. Dickerson*, 85 N. Y. 345; *Farrington v. Payne*, 15 Johns. 432; *Commissioners etc. v. Plumb*, 20 Kan. 147. If there is but one right to be enforced, or one wrong to be redressed, there can be but one cause of action, however many steps are necessary to enforce such right or to redress such wrong: *Meyer v. Van Collem*, 7 Abb. Pr. 222; 23 Barb. 230.

5 *Secor v. Sturgis*, 16 N. Y. 548; 2 Abb. Pr. 67; *Whitaker v. Hawley*, 30 Kan. 317, 328. And see *Bond v. Sewing Machine Co.* 23 Kan. 119; *Stein v. Steamboat etc.* 20 Kan. 147.

6 *Secor v. Sturgis*, 16 N. Y. 548; 2 Abb. Pr. 67. And see *O'Beirne v. Lloyd*, 43 N. Y. 248; *McIntosh v. Lown*, 49 Barb. 550; *Beach v. Crain*, 2 Barb. 120; 2 N. Y. 86.

7 *Badger v. Titcomb*, 15 Pick. 409; *Am. Button Hole etc. Co. v. Thornton*, 28 Minn. 418.

8 See *Am. Button Hole etc. Co. v. Thornton*, 23 Minn. 418.

9 *Stevens v. Lockwood*, 13 Wend. 646; *Guernsey v. Carver*, 8 Wend. 492; *Memmer v. Carey*, 30 Minn. 458. And see *Kansas City Hotel v. Sigement*, 53 Mo. 178; *Ref. Dutch Church v. Brown*, 54 Barb. 191; *Nathans v. Hope*, 77 N. Y. 420.

10 *Smith v. Dittenhoefer*, 1 City Ct. Rep. (N. Y.) 143.

11 *Gustine v. Stoddard*, 23 Hun, 99; *Beekman v. Platter*, 15 Barb. 550; *Bathgate v. Haskin*, 59 N. Y. 533.

12 *Perry v. Dickerson*, 85 N. Y. 345. But compare *Bowman v. Holladay*, 3 Oreg. 182.

13 *People v. Tweed*, 5 Hun, 353; 63 N. Y. 194; 50 How. Pr. 38. And see *Price v. Price*, 2 Hun, 611; *Bebinger v. Sweet*, 6 Hun, 478; 1 Abb. N. C. 263.

14 *Railroad Co. v. Chester*, 57 Ind. 297. Compare *Dickens v. N. Y. Cent. R. R. Co.* 13 How. Pr. 228.

15 *Cracraft v. Cochran*, 16 Iowa, 301.

16 *Perry v. Dickerson*, 85 N. Y. 345; *Draper v. Stouvenel*, 38 N. Y. 219.

17 *Cornell v. Cook*, 7 Cowen, 310; *O'Beirne v. Lloyd*, 43 N. Y. 248; *Millard v. Mo. etc. R. R. Co.* 20 Hun, 191.

18 *Nathans v. Hope*, 77 N. Y. 420. Compare *Merritt v. Nihört*, 11 Iowa, 57.

19 *Nathans v. Hope*, 77 N. Y. 420. See *Dawson v. Lall*, 1 Ariz. 490.

20 *Staples v. Goodrich*, 21 Barb. 317; *Secor v. Sturgis*, 16 N. Y. 548.

§ 39. **Choice of remedy.**—It often occurs that a plaintiff is entitled to elect a remedy, or make a choice between different causes of action.¹ And a judicious election frequently becomes a matter of importance, since it may determine the right to recover;² as where a cause of action exists against one who may effectually plead the defense of infancy if sued on contract, whereas, if sued in tort, the plea of infancy would be of no avail.³ On the other hand, it is often advisable for the plaintiff to waive the tort, and sue the defendant upon contract.⁴ Generally speaking, if goods are wrongfully taken or detained, the plaintiff may waive the tort, and bring an action upon an implied promise to pay for them.⁵ So if one wrongfully obtains money from another, he creates a debt in respect to which the law implies a promise to pay, upon which an action may be maintained as for money had and received.⁶ The nature of the action, whether upon contract or in tort, is to be determined by the facts alleged as constituting the cause of action.⁷ But the mere fact that there are allegations of fraudulent representations in a pleading does not necessarily fix the character of the action as

one *ex delicto*.⁸ And where the allegations of the complaint make a good cause of action on contract, the action is to be regarded as one *ex contractu*, notwithstanding the allegations of false representations which are insufficient to sustain an action of tort.⁹ A party having made his election will not be allowed, although mistaken in his remedy, to change it, and especially when the rights of third parties have intervened.¹⁰ A plaintiff cannot abandon his original cause of action and substitute an entirely new cause of action in his complaint or petition.¹¹ But where, in the case of an action arising on contract, a party elects to sue in tort, he is not thereby barred from suing upon the contract after the dismissal of the first action.¹² And if a party is entitled to two concurrent and distinct remedies, his failure to obtain relief under one of them does not bar him from afterwards resorting to the other.¹³

1 See *Doedt v. Wiswall*, 15 How. Pr. 128; *Campbell v. Perkins*, 8 N. Y. 430; *Nichols v. Pinner*, 18 N. Y. 235; *Fisher v. Hepburn*, 48 N. Y. 41.

2 *Van Leuven v. Lyke*, 1 N. Y. 515; *Kinney v. Kiernan*, 2 Lans. 492.

3 *Fish v. Ferris*, 5 Duer, 49; *Lucas v. Trumbull*, 15 Gray, 306; *Vasse v. Smith*, 6 Cranch, 230; *Eckstein v. Frank*, 1 Daly, 334. Compare *Studwell v. Shafter*, 54 N. Y. 249.

4 See *McKnight v. Dunlap*, 4 Barb. 36; *Hawk v. Thorn*, 54 Barb. 164; *McGoldrick v. Willits*, 52 N. Y. 612; *Hambly v. Trott*, Cowp. 375; *Harway v. Mayor etc.* 1 Hun, 628.

5 *Carey v. Green*, 3 How. Pr. 376; *Putnam v. Wise*, 2 Hill, 140; *Chambers v. Lewis*, 10 Abb. Pr. 206; 11 Abb. Pr. 210; *Gordon v. Bruner*, 49 Mo. 570; *Abbott v. Blossom*, 66 Barb. 353; *Kalckhoff v. Zoehrlaut*, 40 Wis. 427. But it is held that a plaintiff can waive the tort and sue on the contract only where the wrong-doer has sold or otherwise disposed of the property; *Cushman v. Jewell*, 7 Hun, 525; *Tryon v. Baker*, 7 Lans. 511; *Chamblee v. McKenzie*, 31 Ark. 155; *Howell v. Graves*, 27 Ark. 365.

6 *Byxble v. Wood*, 24 N. Y. 007; *Tryon v. Baker*, 7 Lans. 511.

7 *People v. Haberstro*, 16 Alb. L. J. 151; *Cornes v. Harris*, 1 N. Y. 233. And see *Stevens v. Mayor etc.* 84 N. Y. 296; *Booth v. Farmers' etc. Nat. Bank*, 65 Barb. 457.

8 *Sparmann v. Keim*, 83 N. Y. 245; 9 Abb. N. C. 1. And see *Veeder v. Cooley*, 2 Hun, 74; *Falkland v. St. Nicholas Nat. Bank*, 9 N. Y. Week. Dig. 2; *Ledwick v. McKim*, 53 N. Y. 307; *Neffel v. Lightstone*, 77 N. Y. 96.

9 *Sparmann v. Keim*, 83 N. Y. 245; 9 Abb. N. C. 1.

10 *Adams v. Sage*, 23 N. Y. 103; *Wright v. Pierce*, 4 Hun, 351; *Rodermand v. Clark*, 46 N. Y. 354; *Benedict v. Nat. Bank*, 4 Daly, 171; *Hughes v. Vermont Copper Co.* 7 Hun, 677; 72 N. Y. 207.

11 *Lackner v. Turnbull*, 7 Wis. 95; *Stevens v. Brooks*, 23 Wis. 199; *Board of Supervisors v. Decker*, 34 Wis. 380; *Sheldon v. Adams*, 27 How. Pr. 182; *Woodruff v. Dickie*, 5 Robt. 620; *Rutledge v. Van Metre*, 8 Bush, 356; *Carpenter v. Huffstetter*, 87 N. C. 273; *Ramirez v. Murray*, 5 Cal. 222; *Givens v. Wheeler*, 6 Colo. 149; *Humphrey v. Hughes*, 79 Ky. 487; *Tyrrill v. Lamb*, 96 Pa. St. 464.

12 *Arnold v. Clark*, 10 N. Y. Week. Dig. 183; 10 Reporter, 152.

13 *Hurlbut v. Durant*, 12 N. Y. Week. Dig. 477. And see *Manning Co. v. Keenan*, 73 N. Y. 45; *Wheeler v. Ruckman*, 51 N. Y. 399.

§ 40. **Supplemental, nature of.**—A supplemental complaint or petition is allowed, where facts have occurred subsequent to the original complaint or petition, which vary the relief to which the plaintiff was entitled at the commencement of the action.¹ Its office is not to supply facts which, being necessary to the maintenance of the action, have been omitted from the original pleading, but to bring into the record new facts, so that the court may render its final judgment upon the facts existing at the time of its rendition.² These facts must relate to the cause of action upon which the suit has been brought, and be pertinent to the rights and liabilities of the parties connected with the cause of action.³ And a new and substantive cause of action cannot be set up by way of supplemental complaint as a ground of recovery, more especially a cause of action to which the plaintiff was not entitled when he commenced the action.⁴ If, on the facts stated in the complaint or petition, no cause of action exists against the defendant, and no relief can be granted against him on those facts, the action cannot be sustained by filing a supplemental pleading founded upon matters which have subsequently taken place.⁵ The rule in brief is, that a supplemental complaint must be consistent with and in aid of the case made by the original complaint.⁶ It is, in general, the only proper method of

presenting facts occurring during the pendency of the action.⁷ And it is almost a matter of course, in the sound discretion of the court, to allow a supplemental complaint to be filed, if the application is promptly made, and as soon as the necessity is ascertained.⁸ It is, however, the duty of the court, upon the application, to consider all the circumstances, and to grant or refuse it, as may be just and proper in the particular case, and the application should therefore be upon notice, so that both parties may be heard.⁹ The application should in all cases be denied where the same object could be accomplished in another pending suit.¹⁰ A supplemental pleading is governed by all the rules applicable to an original pleading of a similar character,¹¹ and there is, of course, no propriety in inserting in a supplemental complaint or petition any new allegations other than those material to the cause of action.¹² As illustrating the office of a supplemental complaint, it has been allowed for the purpose of setting up additional installments on the same contract, falling due after the commencement of the action;¹³ in replevin for sheep, a supplemental petition was allowed, asking damages for the increase in lambs, and for the wool shorn from the flock subsequently to the commencement of the action;¹⁴ so, in an action for libel, a supplemental complaint was allowed, setting up the circulation of the libel by the defendants, prior and subsequent to the commencement of the action;¹⁵ so, as a general rule, if after the commencement of an action a third party becomes interested in the litigation by assuming the liabilities of the defendant, in respect to the claim which the plaintiff is seeking to enforce, it is proper to allow a supplemental complaint, bringing in such third party as a co-defendant.¹⁶ But in an action for divorce, the plaintiff was not allowed to file a sup-

plemental complaint, setting up acts of infidelity on the part of the defendant, which occurred after the commencement of the action.¹⁷

1 *Hasbrouck v. Shuster*, 4 Barb. 235; *Penman v. Slocum*, 41 N. Y. 53, 60; *McCaslan v. Latimer*, 17 S. C. 123.

2 *Dillman v. Dillman*, 90 Ind. 585.

3 *Wetmore v. Truslow*, 51 N. Y. 338; *Carney v. Taylor*, 4 Kan. 178; *Watson v. Thibou*, 17 Abb. Pr. 184; *Holly v. Graff*, 29 Hun, 443.

4 *Tiffany v. Bowerman*, 2 Hun, 643; *Cohn v. Husson*, 5 Clv. Proc. R. 324; *Buckley v. Buckley*, 12 Nev. 423; *Moon v. Johnson*, 14 S. C. 434.

5 *Lowry v. Harris*, 12 Minn. 255; *Bostwick v. Menck*, 4 Daly, 69; *Smith v. Smith*, 22 Kan. 699; *Muller v. Earle*, 5 Jones & S. 283. And see *Lampson v. McQueen*, 15 How. Pr. 345; *Hendricks v. Decker*, 35 Barb. 296; *Hall v. Olney*, 65 Barb. 27.

6 *Buckley v. Buckley*, 12 Nev. 423; *Gibbon v. Dougherty*, 10 Ohio St. 365, 372; *Tiffany v. Bowerman*, 2 Hun, 643; *Slauson v. Englehart*, 34 Barb. 198; *Buchanan v. Comstock*, 57 Barb. 582; *Milner v. Milner*, 2 Edw. Ch. 114; *Wisner v. Ocumpaugh*, 71 N. Y. 113.

7 *Hoyt v. Sheldon*, 4 Abb. Pr. 50; 6 Duer, 661; *Hornfager v. Hornfager*, 6 How. Pr. 13; *Ormsbee v. Brown*, 50 Barb. 436.

8 *Palmer v. Murray*, 18 How. Pr. 545; *Medbury v. Swan*, 46 N. Y. 200; *Sage v. Mosher*, 17 How. Pr. 367; *Latham v. Richards*, 15 Hun, 123. And see *Spears v. Mayor etc.* 72 N. Y. 442; *Lyon v. Isett*, 42 How. Pr. 155; 11 Abb. Pr. N. S. 353; *McDonald v. Davis*, 12 Hun, 95.

9 *Fleischman v. Bennett*, 79 N. Y. 579. Compare *Garner v. Hannah*, 6 Duer, 202; *Fisk v. Albany etc. R. R. Co.* 8 Abb. Pr. N. S. 309.

10 *Sage v. Mosher*, 17 How. Pr. 367. And where the matter proposed to be added by a supplemental complaint is a cause of action not connected with the original cause of action, and the plaintiff's rights can be enforced by a new action, the motion to allow the filing of a supplemental complaint will be denied: *West v. Burns*, 2 Month. Law Bull. (N. Y.) 55.

11 *Dann v. Baker*, 12 How. Pr. 521; *Goddard v. Benson*, 15 Abb. Pr. 191.

12 *Bowery Nat. Bank v. Duryee*, 55 How. Pr. 83; 74 N. Y. 491.

13 *Fincke v. Rourke*, 20 Hun, 264; *Mill v. Jones*, 5 Neb. 500. Compare *Holly v. Graff*, 29 Hun, 443; *Whiting v. Elchelberger*, 16 Iowa, 422.

14 *Buckley v. Buckley*, 12 Nev. 423.

15 *Corbin v. Knapp*, 5 Hun, 197.

16 *Prouty v. Lake Shore etc. R. R. Co.* 85 N. Y. 272. Compare *Ervin v. Oregon Railway etc. Co.* 23 Hun, 269; 16 N. Y. Week. Dig. 137; *Angell v. Lawton*, 14 Hun, 70; 76 N. Y. 540.

17 *Morange v. Morange*, 2 Month. Law Bull. (N. Y.) 30. And see *Milner v. Milner*, 2 Edw. Ch. 114; *Hoffman v. Hoffman*, 35 How. Pr. 284; *Robertson v. Robertson*, 9 N. Y. Week. Dig. 348. In an action for a divorce from bed and board, the plaintiff may be allowed to file a supplemental complaint, setting forth acts of cruel and inhuman treatment, alleged to have been committed by the defendant since the time of the commencement of the action. They are admissible to give color to, and to explain other matters put in issue by the pleadings: *Cornwall v. Cornwall*, 30 Hun, 573.

CHAPTER III.

DEMURRER TO COMPLAINT OR PETITION.

- § 41. Nature of a demurrer in general.
- § 42. Effect of demurrer.
- § 43. Demurrer confined to face of complaint or petition.
- § 44. Objections must be specific.
- § 45. Effect of not demurring.
- § 46. Waiver or abandonment of demurrer.
- § 47. Want of jurisdiction.
- § 48. Want of capacity to sue.
- § 49. Another action pending.
- § 50. Misjoinder of parties.
- § 51. Defect of parties.
- § 52. Causes of action improperly united.
- § 53. No cause of action.
- § 54. Ambiguity, etc.
- § 55. Demurrer bad in part.
- § 56. When demurrer adjudged frivolous.
- § 57. Amendments after decision of demurrer.

§ 41. *Nature of a demurrer in general.*—The office of a demurrer in common-law pleading is to deny the legal sufficiency of the allegations demurred to.¹ A demurrer is not itself a pleading in the general acceptation of the term, but rather an excuse for not pleading.² It is in effect a declaration that the party demurring will go no further, because the other party has shown nothing against him.³ It raises a question of law which is referred to the court for its decision.⁴ The party putting in a demurrer admits the truth of all such matters of fact as are correctly pleaded, but denies their legal sufficiency, thus referring the law arising on these facts to the judgment of the court.⁵ And the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it.⁶ Demurrers were either *general* or *special*: the

former applying to matters of substance, the latter to matters of form, the particular defect being specifically pointed out and insisted upon as the cause of demurrer.⁷ Under the Code system, a demurrer is called a *pleading*,⁸ and the demurrer and the answer are the only forms of pleading which a defendant can adopt,⁹ and the demurrer can only be adopted in the particular cases prescribed by the statute.¹⁰ It is proper to regard a demurrer now as a pleading created, with its character and office defined, by the Code of the particular State or Territory.¹¹ Its very nature and office, as known to the former practice, have been essentially changed, and defects which under that practice were waived, unless pleaded in abatement, are now legitimate grounds of demurrer, while other defects, which were once well recognized grounds of demurrer, are now remedied on motion or wholly disregarded.¹² In short, no pleading is demurrable under the Code system, unless it is subject to one or more of the objections specifically pointed out in the statute as grounds of demurrer.¹³

1 Nowlan v. Geddes, 1 East, 634; Hobson v. McArthur, 3 McLean, 241; Hall v. Bartlett, 9 Barb. 237. And see § 3, *ante*.

2 Gayle v. Smith, Minor, 83.

3 Co. Litt. 71 b.

4 United States v. Arnold, 1 Gall. 348; Governor v. Lindsay, 14 Ala. 658; Henderson v. Stringer, 6 Gratt. 130; Roberts v. White, 3 Wis. 414.

5 Chapin v. Curtis, 23 Conn. 388; Havens v. Hartford etc. R. R. Co. 28 Conn. 69; Matthews v. Tower, 39 Vt. 433; Cox v. Gulick, 10 N. J. L. 228; Bohe v. Frowner, 18 Ala. 89; Branham v. Mayor etc. 24 Cal. 602.

6 Keay v. Goodwin, 16 Mass. 1; Frost v. Hammatt, 11 Pick. 75; Ward v. Stout, 32 Ill. 399; Calais v. Bradford, 51 Me. 414; Commonw. v. Pittsburg etc. R. R. Co. 54 Pa. St. 26; Bishop v. Quintard, 18 Conn. 395; Gorman v. Lennox, 15 Peters, 115; Lipe v. Becker, 1 Denio, 568; Hooker v. Gallagher, 6 Fla. 351.

7 See Co. Litt. 72 a; Archb. Civ. Plead. 310; Commonw. v. Cross Cut R. R. Co. 53 Pa. St. 62; Jackson v. Rundlet, 1 Wood. & M. 381; Stewart v. Dearing, 13 Phila. 175; Drals v. Hogan, 50 Cal. 127; Steamboat Revelle v. Case, 9 Mo. 498.

8 See N. Y. Code Civ. Proc. § 487; Howard v. Michigan etc. R. R. Co. 5 How. Pr. 206; Oliphant v. Whitney, 34 Cal. 25.

9 N. Y. Code Civ. Proc. § 487; *De Witt v. Swift*, 3 How. Pr. 283; N. C. Code Civ. Proc. § 94; *Ransom v. McClees*, 64 N. C. 17.

10 *De Witt v. Swift*, 3 How. Pr. 283; *Beale v. Hayes*, 5 Sand. 640; *Harper v. Chamberlain*, 11 Abb. Pr. 284.

11 *Manchester v. Storrs*, 3 How. Pr. 410.

12 *De Witt v. Swift*, 3 How. Pr. 280; 1 Code Rep. 24; 6 N. Y. Leg. Obs. 314. And see *Prindle v. Caruthers*, 15 N. Y. 425; *Ward v. Ward*, 5 Abb. Pr. N. S. 145; *Bostwick v. Dry Goods Bank*, 67 Barb. 449; *Johnston Harvester Co. v. Bartley*, 94 Ind. 131; *Williamson v. Yingling*, 93 Ind. 42; *Wright v. Williams*, 83 Ind. 421; *Carter v. Ford Plate Glass Co.* 85 Ind. 180; *Union Bank v. Bell*, 14 Ohio St. 200, 208; *Bushey v. Reynolds*, 31 Ark. 662; *Dyer v. Jacoway*, 42 Ark. 193.

13 *Marle v. Garrison*, 83 N. Y. 14. And see *Getty v. Hudson River R. R. Co.* 8 How. Pr. 177; *Dunn v. Barnes*, 73 N. C. 273; *Hentsch v. Porter*, 10 Cal. 555. Compare *McClary v. Sioux City etc. R. R. Co.* 3 Neb. 44. No demurrer lies to a supplemental complaint: *Derry v. Derry*, 98 Ind. 319; *Morey v. Ball*, 90 Ind. 450.

§ 42. *Effect of demurrer.*—Under the Code system of pleading, as well as at common law, a demurrer is in effect a declaration that the party will go no further, because the other has shown nothing against him.¹ The office of a demurrer is to raise issues of law upon the facts stated in the pleading demurred to;² and it admits the truth of the facts that are relevant and well pleaded, so far as is necessary to determine the question raised.³ But mere statements of legal conclusions are not admitted;⁴ thus, averments in a complaint as to the meaning or contents of a paper set forth therein, or annexed to and made part thereof, are not admitted by a demurrer.⁵ It is however held, that a demurrer remaining upon the record of the court is an admission of the facts stated in the pleading to which it is interposed, not only for the purposes of the argument, but as evidence upon the trial of the issues to which the pleading demurred to relates.⁶

1 *Webb v. Vanderbilt*, 7 Jones & S. 4; *Hierfort v. Cramer*, 7 Colo. 483.

2 *Freeman v. Frank*, 10 Abb. Pr. 870; *Bradley v. Rodelsperger*, 17 S. C. 9; *Brennan v. Ford*, 48 Cal. 7; *Brooks v. Gibbons*, 4 Paige, 374; *Wilson v. Mayor etc.* 15 How. Pr. 502.

3 *Branham v. Mayor etc.* 24 Cal. 602; *Levy v. Curtis*, 1 Abb. N. C. 189; *Standish v. Dow*, 21 Iowa, 363; *Griggs v. City of St. Paul*, 9 Minn. 246; *Blake v. Griswold*, 63 N. Y. 294; *Hance v. Hair*, 25 Ohio St. 249; *Van Doren v. Tjader*, 1 Nev. 380; *Freeman v. Hart*, 61 Iowa, 525.

4 *Supervisors etc. v. Seabury*, 11 Abb. N. C. 461, 464; *Finch v. Board of Education*, 30 Ohio St. 41; *Wilson v. Clarke*, 20 Minn. 367; *Sherwood v. Sherwood*, 45 Wis. 357; *Kleekamp v. Meyer*, 5 Mo. App. 444; *Boley v. Griswold*, 2 Mont. 447; *Mauney v. Ingram*, 78 N. C. 96; *Simpson v. Prather*, 5 Oreg. 86; *Hall v. Bartlett*, 9 Barb. 297; *Freeman v. Hart*, 61 Iowa, 525.

5 *Blake v. Griswold*, 68 N. Y. 294; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250.

6 *Cutler v. Wright*, 22 N. Y. 472. See § 46, *post*.

§ 43. Demurrer confined to face of complaint or petition.

—The objections to a complaint or petition, which are specifically enumerated as grounds of demurrer under the Code system of pleading, must appear upon the face of the pleading;¹ and unless the objection does so appear, it is no ground for a demurrer, but should be set up by way of answer.²

1 See N. Y. Code Civ. Proc. § 488; Cal. Code Civ. Proc. § 430; 2 Ohio Rev. Stats. § 5062; *Wilson v. Mayor etc.* 15 How. Pr. 500; 6 Abb. Pr. 6; *Simpson v. Loft*, 8 How. Pr. 234; *Mayberry v. Kelly*, 1 Kan. 116; *Coe v. Beckwith*, 31 Barb. 339; 19 How. Pr. 398; *Aurora v. Cobb*, 21 Ind. 492; *Davy v. Betts*, 23 How. Pr. 396; *Collins v. Davis*, 57 Iowa, 254.

2 *Powers v. Ames*, 9 Minn. 178; *Getty v. Hudson River R. R. Co.* 8 How. Pr. 177; *Irving Nat. Bank v. Corbett*, 10 Abb. N. C. 85; Cal. Code Civ. Proc. § 433; *Gillam v. Sigman*, 23 Cal. 637; *Moore v. Hobbs*, 77 N. C. 65.

§ 44. Objections must be specified.—The demurrer must distinctly specify the objections,¹ or grounds of objection,² to the complaint or petition,³ and if it omit to do so, it may be disregarded and treated as a nullity.⁴ Under the Code system of pleading, every demurrer, whether for substance or form, is deemed a special demurrer, and must clearly specify the ground of objection to the complaint or petition, or be disregarded as frivolous.⁵ But nothing more is required than that the party demurring shall specify distinctly upon which of the several grounds of objection enumerated he relies to sustain his demurrer.⁶ An objection to the jurisdiction of the court, or that the complaint or petition does not state facts sufficient to constitute a cause of action, may be raised by a demurrer, which merely

specifies such ground of objection in the language of the statute.⁷ But a demurrer for any other reason must point out specifically the particular defect relied upon.⁸ Where the party demurring to a complaint, in addition to the words of the statute, specifies certain grounds of insufficiency, he can only rely upon the defects specified;⁹ but the rule is otherwise if the demurrer is general, in the words of the statute, and without specification.¹⁰ The demurrer may be interposed to the whole complaint or petition, or to one or more separate causes of action stated therein.¹¹ But a complaint containing several causes of action, which is demurred to generally, will be sustained, provided any one cause of action is sufficiently stated;¹² and therefore, if a demurrer is intended to apply to certain parts only of a complaint, the parts intended should be specified.¹³ A defendant may answer to some of the causes of action in the same complaint and demur to others,¹⁴ but he cannot answer certain allegations and demur to others in the same cause of action.¹⁵ Demurrer and answer are different pleadings,¹⁶ and a defendant cannot demur and answer to the same matter.¹⁷ But if a paper is both an answer and demurrer, it will be allowed as an answer, if otherwise sufficient, and a motion to compel an election is not proper.¹⁸

1 N. Y. Code Civ. Proc. § 400.

2 Ohio Rev. Stats. § 5063; N. C. Code Civ. Proc. § 96; Cal. Code Civ. Proc. § 431; *Davidson v. Biggs*, 61 Iowa, 309.

3 *Harper v. Chamberlain*, 11 Abb. Pr. 234; *People v. Crooks*, 53 N. Y. 648.

4 N. Y. Code Civ. Proc. § 400; N. C. Code Civ. Proc. § 96; *Powers v. Ames*, 9 Minn. 178.

5 *Love v. Commissioners etc.* 64 N. C. 706. And see *Cowan v. Baird*, 77 N. C. 201; *Drals v. Hogan*, 50 Cal. 127.

6 *Durkee v. Saratoga etc. R. R. Co.* 4 How. Pr. 226; *Getty v. Hudson River R. R. Co.* 8 How. Pr. 177; *De Witt v. Swift*, 3 How. Pr. 281; *Lagow v. Neilson*, 10 Ind. 183.

7 *Ellissen v. Halleck*, 6 Cal. 386; *Kent v. Snyder*, 30 Cal. 666; *Durkee v. Saratoga etc. R. R. Co.* 4 How. Pr. 226. And so, in New

York, as to an objection that there is another action pending between the same parties, for the same cause: N. Y. Code Civ. Proc. § 490.

8 N. Y. Code Civ. Proc. § 490; *Kent v. Snyder*, 30 Cal. 663.

9 *Nellis v. De Forest*, 18 Barb. 61; *Lopez v. Central Arizona Min. Co.* 1 Ariz. 464. And see *Hobart v. Frost*, 5 Duer, 672; *Hotchkiss v. Elling*, 36 Barb. 33; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648.

10 *Lopez v. Central Arizona Min. Co.* 1 Ariz. 464.

11 Cal. Code Civ. Proc. § 431; N. Y. Code Civ. Proc. § 492; *Ogdensburgh Bank v. Paige*, 2 Code R. 75.

12 *Cooper v. Clason*, 1 Code R. N. S. 347; *Hyde v. Supervisors etc.* 43 Wis. 129; *Newbery v. Garland*, 31 Barb. 121; *First Nat. Bank v. How*, 28 Minn. 150; *Butler v. Wood*, 109 How. Pr. 223; *Sheldon v. Hoy*, 11 How. Pr. 11; *Seaver v. Hodgkin*, 63 How. Pr. 128; *Jacques v. Morris*, 2 Smith, E. D. 639; *Griffiths v. Henderson*, 49 Cal. 566; *Weaver v. Conger*, 10 Cal. 233; *Bruce v. Benedict*, 31 Ark. 801; *Potter v. Hussey*, 1 Utah, 249; *Wheeler v. Conn. Mut. Life Ins. Co.* 82 N. Y. 543; 37 Am. Rep. 594.

13 *Matthews v. Beach*, 8 N. Y. 173; *Jarvis v. Palmer*, 11 Paige, 650.

14 N. Y. Code Civ. Proc. § 492; *Ransom v. McClees*, 64 N. C. 17. If there be several defendants, some may answer while others demur: *Webb v. Vanderbilt*, 7 Jones & S. 4.

15 *Ransom v. McClees*, 64 N. C. 17. And see *Lord v. Vreeland*, 24 How. Pr. 313; 15 Abb. Fr. 123; *Clark v. Van Deusen*, 3 Code R. 213; *Hayden v. Anderson*, 17 Iowa, 156; *Sumner v. Young*, 65 N. C. 579.

16 *Howard v. Michigan etc. R. R. Co.* 5 How. Pr. 206. And see *Kelly v. Downing*, 42 N. Y. 71. The test as to whether a pleading is a demurrer or answer is, does it require any proof to establish it? If so, it is an answer and not a demurrer: *Struver v. Ocean Ins. Co.* 16 How. Pr. 422. And see *Dillaye v. Wilson*, 43 Barb. 251.

17 *Spellman v. Welder*, 5 How. Pr. 5; *Munn v. Barnum*, 1 Abb. Pr. 231; 12 How. Pr. 563; *Davis v. Hines*, 6 Ohio St. 473.

18 *Bernard v. Morrison*, 2 Civ. Proc. R. (McCarty) 425; reversing S. C. 64 How. Pr. 108.

§ 45. **Effect of not demurring.**—If a defendant fails to demur to the complaint or petition in any case in which a demurrer is allowable, he must be deemed to have waived every objection which might have been thus raised, excepting only the objection to the jurisdiction of the court, and the objection that facts sufficient to constitute a cause of action are not stated.¹ An omission to demur is not a waiver of these latter defects, even where the defect is apparent on the face of the complaint or petition, nor are they waived by an omission to set them up in the answer.² The objection may be taken advantage of at any stage of the trial.³

1 Cal. Code Civ. Proc. ‡ 434; *Learned v. Castle*, Sup. Ct. Cal. 3 West C. Rep. 154; N. C. Code Civ. Proc. ‡ 99; N. Y. Code Civ. Proc. ‡ 493; *Burns v. Ashworth*, 72 N. C. 496; *Durham v. Bostwick*, 72 N. C. 353; *Blossom v. Barrett*, 37 N. Y. 434; *Fourth Nat. Bank v. Scott*, 31 Hun, 301; *Sherman v. Inman* S. S. Co. 26 Hun, 107; *Patchin v. Peck*, 38 N. Y. 39; *Zabriskie v. Smith*, 13 N. Y. 222; 2 Ohio Rev. Stats. ‡ 5064. A demurrable objection cannot be taken by answer: *Petrie v. Lansing*, 66 Barb. 357; *Bebinger v. Sweet*, 6 Hun, 478; 1 Abb. N. C. 268.

2 *Lounsbury v. Purdy*, 18 N. Y. 515; *Coffin v. Reynolds*, 37 N. Y. 640; 2 Wait's Pr. 456; *De Bussiere v. Holladay*, 4 Abb. N. C. 111; *Pittman v. Myrick*, 16 Fla. 602; *Bartges v. O'Neill*, 13 Ohio St. 72.

3 *Higgins v. Rockwell*, 2 Duer, 650; *Winterson v. Railroad Co.* 2 Hilt. 389. And see *People v. Central R. R. Co.* 42 N. Y. 283; ‡ 53, post.

‡ 46. **Waiver or abandonment of demurrer.**—Where a defendant, after his demurrer to the complaint has been overruled, avails himself of permission to answer on terms, he must be deemed to have abandoned his demurrer;¹ and a demurrer which the party has abandoned is no longer a part of the record.² But if the defendant's demurrer be overruled, with permission to him to withdraw it upon terms, and he goes to trial without complying with the terms, the demurrer will form a part of the record; and is an admission of the facts stated in the pleading to which it is interposed.³ If the defendant answers prior to, and without a decision upon a demurrer previously filed by him to the complaint or petition, he thereby waives his demurrer.⁴ So, the effect of an amendment to the complaint or petition after a demurrer has been interposed is to submit to the demurrer,⁵ and if a demurrer be filed to the amended pleading, the first demurrer will be considered waived.⁶ Generally, by answering over to the merits, the defendant waives any error based upon the ruling on a demurrer;⁷ but the rule is otherwise under Codes which allow a defendant to demur and answer both at the same time.⁸

1 *Irvine v. Forbes*, 11 Barb. 587; *Greenwood v. Brink*, 1 Hun, 227; *Harper v. Leal*, 10 How. Pr. 278; *Hayes v. Kedzie*, 11 Hun, 577; *Richards v. Fanning*, 5 Oreg. 356; *Pottinger v. Garrison*, 3 Neb. 221; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Carson v. Osborn*, 10 Moa. B. 156; *Jones v. Terry*, 43 Ark. 230.

2 *Brown v. Saratoga R. R. Co.* 18 N. Y. 495. And see *Wheelock v. Lee*, 74 N. Y. 495; 5 Abb. N. C. 72; *Overland Dispatch Co. v. Wedeles*, 1 New Mexico, 528.

3 *Cutler v. Wright*, 22 N. Y. 472. A demurrer precedes an answer, and cannot be put in after it without leave obtained to withdraw the answer: *Finch v. Baskerville*, 85 N. C. 205.

4 *Morrison v. Fishel*, 64 Ind. 177; *Moss v. Witness Printing Co.* 64 Ind. 125; *Farrar v. Triplett*, 7 Neb. 237; *Frank v. Bush*, 63 How. Pr. 232; 2 Civ. Proc. R. 350; *Musgrave v. Webster*, 53 How. Pr. 365; *Adams v. West Shore etc. R. R. Co.* 65 How. Pr. 329. Compare *Robertson v. Bennett*, 1 Abb. N. C. 476; *People v. Whitwell*, 62 How. Pr. 383.

5 *District Township v. District Township*, 44 Iowa, 512; *Perkins v. Davis*, 2 Mont. 474; *Gale v. Tuolumne Water Co.* 14 Cal. 28.

6 *District Township v. District Township*, 44 Iowa, 512.

7 *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Harval v. Gray*, 10 Neb. 186; *Dorrington v. Minnick*, 15 Neb. 397; *Westphal v. Henney*, 49 Iowa, 542; *Stanbury v. Kerr*, 6 Colo. 28; *Webb v. Smith*, 6 Colo. 365; *Ward v. Mooney*, 1 Wash. 104. And see *Shamokin Bank v. Street*, 16 Ohio St. 1; *Perkins v. Davis*, 2 Mont. 474; *Beall v. Territory*, 1 New Mexico, 507.

8 *Wines v. Stevens*, 1 Utah, 305. And see *People v. McClellan*, 31 Cal. 101.

§ 47. **Want of jurisdiction.**—The defendant may demur to the complaint or petition, where it appears upon the face thereof that the court has not jurisdiction of the person of the defendant, or the subject of action.¹ The question of jurisdiction should be raised either by demurrer or answer.² If want of jurisdiction appears upon the face of the complaint, the objection should be taken by demurrer, otherwise by answer.³ But objection to the jurisdiction is not to be deemed waived even if not taken by demurrer or answer.⁴ It may still be raised on appeal.⁵ A demurrer assigning as its ground "that the court has no jurisdiction of the person," does not raise any question as to the regularity of the proceedings by which service of process has been made, but only the question whether the defendant is such a person as can be subjected by process to the jurisdiction of the court.⁶ If the suit has been irregularly commenced, the defendant's remedy is by motion against the irregularity.⁷ If a demurrer be

interposed to a complaint containing several causes of action properly united, but of one of which the court has no jurisdiction, it will be overruled if it is to the whole complaint, and assigns no cause of demurrer except the improper union of several causes of action;³ the demurrer in such case should be limited to the cause of action of which the court has no jurisdiction.³

1 Cal. Code Civ. Proc. § 430, subd. 1; 2 Ohio Rev. Stats. § 5062, subd. 1; Doll v. Feller, 16 Cal. 432; Powers v. Ames, 9 Minn. 178; Bank of Charlotte v. Britton, 66 N. C. 365; Swann v. Phoenix Iron Co. 58 Ga. 190.

2 Atlantic-etc. Tel. Co. v. Baltimore etc. R. R. Co. 87 N. Y. 355.

3 Johnson v. Adams Tobacco Co. 14 Hun, 89; Crowley v. Royal Exchange Shipping Co. 2 Civ. Proc. R. 174; Wilson v. Mayor etc. 15 How. Pr. 500; 6 Abb. Pr. 6.

4 De Bussiere v. Holladay, 4 Abb. N. C. 111; Hughey v. Sldwell, 18 Mon. B. 261; § 45, *ante*.

5 Hotchkiss v. Elding, 36 Barb. 38. See Burnham v. De Bevoise, 8 How. Pr. 160.

6 Nones v. Hope Ins. Co. 5 How. Pr. 96; 8 Barb. 541; Ogdensburgh etc. R. R. Co. v. Vermont etc. R. R. Co. 16 Abb. Pr. N. S. 249; 4 Hun, 712.

7 Nones v. Hope Ins. Co. 8 Barb. 541; 5 How. Pr. 96.

8 Cook v. Chase, 3 Duer, 64.

9 Cook v. Chase, 3 Duer, 643. A demurrer on the grounds "that the court has no jurisdiction either of the person of the defendants or of the subject of the action," and "that the complaint does not state facts sufficient to constitute a cause of action," is held to be sufficiently explicit under the rule of construction adopted by the courts of California: *Elissen v. Halleck*, 6 Cal. 386. Compare *Kent v. Snyder*, 30 Cal. 668.

§ 48. **Want of capacity to sue.**—Objection that the plaintiff has not legal capacity to sue, when apparent on the face of the complaint or petition, should be taken by demurrer and not by answer.¹ But a demurrer on the ground that the plaintiff has not legal capacity to sue can only be sustained where the pleading discloses some legal incapacity, such as infancy, lunacy, and the like.² The want of capacity must appear from the facts that are stated, and not from the omission of facts that would expose such want;³ in the latter case, the objection must be taken by answer.⁴ Thus, if it appears

upon the face of the pleading that a plaintiff suing as a corporation is not such in fact, a demurrer is proper;⁵ but if the pleading does not show upon its face that the plaintiff is not a corporation, the objection that it is not such should be taken by answer.⁶ The objection of want of legal capacity in the plaintiff to sue is waived, unless it be taken either by demurrer or answer.⁷ But where the plaintiff sues by a name representing no person, natural or artificial, it seems that the objection must be taken by motion and not by demurrer.⁸

1 Cal. Code Civ. Proc. § 430, subd. 2; N. Y. Code Civ. Proc. § 488, subd. 3; *Matthews v. Stietz*, 5 Civ. Proc. R. 235; *Hobart v. Frost*, 5 Duer, 672; *Myers v. Machado*, 6 Duer, 678; 14 How. Pr. 149; *Haskins v. Alcott*, 13 Ohio St. 210.

2 *Winfield Town Co. v. Maris*, 11 Kan. 123; *Dale v. Thomas*, 67 Ind. 570; *Farrell v. Cook*, 16 Neb. 483. And see *Bartholomew v. Lyon*, 67 Barb. 86; *Grantman v. Thrall*, 44 Barb. 173; *Robbins v. Wells*, 28 How. Pr. 15; 18 Abb. Pr. 191; *Jones v. Steele*, 36 Mo. 324; *McNair v. Toler*, 21 Minn. 175. That it applies to all cases where the plaintiff, though having an interest in the subject of the suit and the relief demanded, does not show a right to appear in court and demand such relief in his own name: *Bulkley v. Big Muddy Iron Co.* 77 Mo. 105.

3 *Phoenix Bank v. Donnell*, 41 Barb. 571; 40 N. Y. 410; *Doll v. Feller*, 16 Cal. 432; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327; *State v. Torinus*, 23 Minn. 272; *American Button Hole Co. v. Moore*, 2 Dakota, 280, 290.

4 *Barclay v. Quicksilver Min. Co.* 6 Lans. 25; *Swamp etc. District v. Feck*, 60 Cal. 403.

5 *Phoenix Bank v. Donnell*, 41 Barb. 571; 40 N. Y. 410. Compare *Rauh v. Board of Commissioners*, 68 How. Pr. 363; *Toimie v. Dean*, 1 Wash. 46; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648.

6 *Phoenix Bank v. Donnell*, 40 N. Y. 410; 2 Wait's Pr. 448.

7 *Hastings v. McKinley*, 1 Smith, E. D. 273; *Tapley v. Tapley*, 10 Minn. 448; *Palmer v. Davis*, 28 N. Y. 242; *Van Amringe v. Barnett*, 8 Bosw. 357; *Hoop v. Plummer*, 14 Ohio St. 448; *Jones v. Steele*, 36 Mo. 324; *Pettigrew v. Washington Co.* 43 Ark. 33.

8 *Bank of Havana v. Magee*, 16 How. Pr. 97; 7 Abb. Pr. 134; 20 N. Y. 355. And see *Gardner v. McClure*, 6 Minn. 250.

§ 49. **Another action pending.**—The defendant may demur, when it appears upon the face of the complaint or petition that there is another action pending between the same parties, for the same cause.¹ If the fact does not appear upon the face of the complaint or petition, the remedy is by answer and not by demurrer.² Nor

can a demurrer be sustained on this ground, unless it appears that both actions are for the identical cause of action ;³ nor will it lie when the party demurring is not a party to the former suit ;⁴ though it is immaterial which of the parties to the action in which the demurrer is interposed commenced the prior action.⁵ Nor does it matter that the prior proceeding is not strictly an action, but was an attachment, or citation before a surrogate, or a proceeding in court founded on a petition.⁶ The principle governing such cases is, that if full relief can be had in the one suit, no others shall be allowed, and a demurrer lies ;⁷ but if the prior action is for relief which could not be granted in the action demurred to, this principle does not apply.⁸ And a demurrer is not sustained where the other action is pending in a court of the United States, or of a sister State.⁹

1 Cal. Code Civ. Proc. § 430, subd. 3 ; N. Y. Code Civ. Proc. § 488, subd. 4 ; 2 Ohio Rev. Stats. § 5082, subd. 3 ; *Bishop v. Bishop*, 7 Robt. 194 ; *Mosher v. Ind. School District*, 42 Iowa, 632 ; *Harris v. Johnson*, 65 N. C. 478 ; *Hamlin v. Wright*, 23 Wis. 491.

2 *Hornfager v. Hornfager*, 1 Code R. N. S. 412 ; 6 How. Pr. 279 ; *Burrows v. Miller*, 5 How. Pr. 51.

3 *Kelsey v. Ward*, 16 Abb. Pr. 98 ; *Paige v. Willson*, 8 Bosw. 204.

4 *Geery v. Webster*, 11 Hun, 423. And see *Auburn City Bank v. Leonard*, 20 How. Pr. 133.

5 *Hornfager v. Hornfager*, 1 Code R. N. S. 412 ; 6 How. Pr. 279 ; 2 Walt's Pr. 448 ; *Groshon v. Lyon*, 16 Barb. 461. That in order to sustain the demurrer, the plaintiff in the latter action must be the plaintiff in the former action : See *Walsworth v. Johnson*, 41 Cal. 61 ; *O'Connor v. Blake*, 29 Cal. 312 ; *Wadleigh v. Veazie*, 3 Sum. 165.

6 *Groshon v. Lyon*, 16 Barb. 461.

7 *Groshon v. Lyon*, 16 Barb. 461. See *Daubman v. Schulting*, 51 How. Pr. 337.

8 *Haile v. Baker*, 5 N. Y. 357. See *Cordier v. Cordier*, 20 How. Pr. 187.

9 *Cook v. Litchfield*, 5 Sand. 330 ; *Williams v. Ayrault*, 31 Barb. 364 ; *Burrows v. Miller*, 2 Code R. 101 ; 5 How. Pr. 51 ; *Sloan v. McDowell*, 75 N. C. 23.

§ 50. *Misjoinder of parties.*—By a misjoinder of parties is meant an excess of parties.¹ And under the Codes of some of the States and Territories, a misjoin-

der of parties, plaintiff or defendant, is expressly made a ground of demurrer.² In other States, a misjoinder of parties, plaintiff but not defendant, is expressly made a ground of demurrer.³ But in many of the States which have adopted the Code system of pleading, a misjoinder of parties, plaintiff or defendant, cannot be assailed by demurrer;⁴ if, however, the facts stated in the pleading show no cause of action against the defendants in favor of one of the plaintiffs, the defendants may demur as to such plaintiff, upon the ground that the pleading does not state facts sufficient to constitute a cause of action.⁵ So, a defendant improperly joined may demur on the ground that no cause of action is stated against him.⁶ Thus, in a suit for relief from fraud, against several defendants, where as to one of them the complaint fails to show any knowledge of or connection with it, he is not a proper party, and a demurrer by him should be sustained.⁷ Under Codes making a misjoinder of parties plaintiff a ground of demurrer, when such misjoinder appears upon the face of the complaint, the objection must be taken by special demurrer, and if not so taken it is waived;⁸ it cannot be raised under a demurrer interposed, upon the ground that the complaint does not state facts sufficient to constitute a cause of action.⁹ But a misjoinder of parties plaintiff, which does not appear upon the face of the complaint, may be pleaded in the answer, and be made a ground of nonsuit against all the plaintiffs.¹⁰ If a cause of action is shown, objection to the misjoinder of parties plaintiff cannot be taken by demurrer, unless such misjoinder was a ground of demurrer when the issue was framed.¹¹ A demurrer for the misjoinder of parties, which does not show wherein there is such misjoinder, will be overruled.¹² Where a plaintiff brings suit in his individual right,

and also in his representative capacity, as executor, a demurrer to the complaint on the ground of misjoinder of parties plaintiff will be sustained.¹³ Where certain parties defendant are improperly joined, advantage of the misjoinder cannot be taken by the defendants properly joined, when the former disclaim all interest in the subject-matter of the litigation, and their disclaimer is acted upon by the court and accepted by the plaintiffs.¹⁴

1 *Nell v. Trustees etc.* 31 Ohio St. 15, 20.

2 See Cal. Code Civ. Proc. § 430, subd. 4; Utah Code, § 292, subd. 4; Nev. Code, § 40; Mont. Code, § 86; Colo. Code, § 51; Ga. Code, (1882) § 4192; Idaho Code, § 232; Wyoming Code, § 85; *Rowe v. Bagcailuppi*, 21 Cal. 633.

3 See N. Y. Code Civ. Proc. § 498, subd. 5; 2 Ohio Rev. Stats. § 5062, subd. 4; *Enos v. Leach*, 18 Hun, 130. That there is a misjoinder of parties defendant is not a ground of demurrer in New York: *Fish v. Hose*, 59 How. Pr. 238. And see *Nichols v. Drew*, 94 N. Y. 26.

4 See *Dean v. English*, 18 Mon. B. 132; *Fry v. Street*, 37 Ark. 39; *Ind. School District v. Ind. School District*, 50 Iowa, 322; *White Oak Township v. Oskaloosa Township*, 44 Iowa, 512; *Roose v. Perkins*, 9 Neb. 304; *Hoard v. Clum*, 31 Minn. 186; *Hill v. Marsh*, 46 Ind. 218; *Great Western Compound Co. v. Aetna Ins. Co.* 40 Wis. 373; *Marsh v. Waupaca Co.* 38 Wis. 250. So in New York and Ohio, as it respects misjoinder of parties defendant: *Palmer v. Davis*, 28 N. Y. 242; *Richtmeyer v. Richtmeyer*, 50 Barb. 55; *Fish v. Hose*, 59 How. Pr. 238; *Clark v. Bayer*, 32 Ohio St. 299; *Powers v. Bumcratz*, 12 Ohio St. 273; *Nell v. Trustees etc.* 31 Ohio St. 15. Misjoinder of unnecessary parties is a mere matter of surplusage under the North Carolina Code: *Burns v. Ashworth*, 72 N. C. 496; *Davidson v. Elms*, 67 N. C. 228.

5 *Richtmeyer v. Richtmeyer*, 50 Barb. 55. And see *Marsh v. Board of Supervisors*, 38 Wis. 250; *Willard v. Reas*, 26 Wis. 540; *Bumsey v. Lake*, 55 How. Pr. 340.

6 *Lewis v. Williams*, 3 Minn. 151, 154. And see *Nichols v. Drew*, 94 N. Y. 22.

7 *Belknap v. Caldwell*, 83 Ind. 14.

8 *Gillam v. Sigman*, 29 Cal. 637; *Tennant v. Pfister*, 51 Cal. 511, 515; *Green v. Taney*, 3 Pacif. L. Rep. 423; *Learned v. Castle*, Sup. Ct. Cal. 3 West C. Rep. 154. And see *Enos v. Leach*, 18 Hun, 139.

9 *Tennant v. Pfister*, 51 Cal. 511.

10 *South Fork etc. Co. v. Snow*, 49 Cal. 155. That misjoinder of parties plaintiff cannot be taken advantage of unless the objection was raised in the court below: See *Long v. De Bevois*, 31 Ark. 480; *Well v. Simmons*, 66 Mo. 617.

11 *Smith v. Rathbun*, 22 Hun, 150, 157.

12 *Fultz v. Walters*, 2 Mont. 165; *Berney v. Drexel*, 33 Hun, 419; 19 N. Y. Week. Dig. 515; *Irvine v. Wood*, 7 Colo. 477.

13 *Dias v. Phillips*, 59 Cal. 293.

14 *Pfister v. Dascey*, Sup. Ct. Cal. 3 West C. Rep. 303.

§ 51. **Defect of parties.**—A defect of parties, plaintiff or defendant, when it appears upon the face of the complaint or petition, is a good ground of demurrer,¹ and the objection can be properly taken only by demurrer.² Thus, in actions sounding in tort, if it appears from the complaint that all the proper parties are not made plaintiffs, the defendant should demur, and the omission to do so will be a waiver of the defect, although the non-joinder be set up in the defendant's answer.³ The general rule is, that in every case where a demurrer can be interposed for a defect of parties, the defendant is confined to that remedy, and an answer is not permitted except where evidence is necessary to make the defect apparent.⁴ The objection is waived, if not taken by demurrer or answer.⁵ In order to sustain a demurrer for a defect of parties, it must appear that the party demurring has an interest in having the omitted parties joined,⁶ or that he is prejudiced by the non-joinder.⁷ And it was formerly held, that a demurrer for a defect of parties would not lie, unless it appeared from the complaint that the omitted parties are living;⁸ but this is no longer the rule, and a demurrer will lie, unless it appears on the face of the complaint that the omitted parties are dead.⁹ In an action for trespass upon lands held in common, if it appears by the complaint that the plaintiffs are only part of the owners, and it does not appear that the others are joined as defendants, a demurrer is the proper remedy to raise the objection of a defect of parties.¹⁰ So, if it appears upon the face of the complaint that the plaintiff, claiming to be the owner of a one-third interest in a chattel, has brought the action to recover damages for the conversion of such interest by the defendant, an objection to his omission to make the owners of the remaining two thirds of the chattel parties to the action must be taken by de-

murrer.¹¹ So, it is generally held, that if a contract is made with two persons jointly, and one of them sues on it as a several contract with him, the non-joinder can only be taken advantage of by demurrer or answer.¹² In an action against one of two obligors or contractors, upon a *joint* obligation or contract, the complaint or petition is demurrable for a defect of parties.¹³ But a complaint which avers that the defendants and others, whose names are not known, are stockholders, and that it is impracticable from their great number to bring them all before the court, is not demurrable for defect of parties;¹⁴ in such case one may sue or be sued for all the others.¹⁵ A demurrer for defect of parties raises a question of law, upon the facts stated in the complaint or petition, and is not a mere substitute for the common-law plea in abatement.¹⁶ It must specify the particular defect objected to, and is insufficient if it merely follows the words of the statute.¹⁷ Generally speaking, if the court can determine the controversy before it without prejudice to the rights of others, or by saving their rights, then a demurrer for non-joinder is not well taken;¹⁸ if, on the contrary, a complete determination of the controversy cannot be had without the presence of other parties, then the demurrer is well taken.¹⁹

1 Cal. Code Civ. Proc. § 490, subd. 4; N. Y. Code Civ. Proc. § 488, subd. 6; 2 Ohio Rev. Stats. § 5062, subd. 5; N. C. Code Civ. Proc. § 96, subd. 4; Snyder v. Voorhes, 7 Colo. 296. An *excess* of parties is not a ground of demurrer as a "defect of parties": Hoard v. Clum, 31 Minn. 186; Arzbacher v. Mayer, 53 Wis. 380.

2 Hees v. Nellis, 1 Thomp. & C. 118; 65 Barb. 440; Davidson v. Elms, 67 N. C. 223; State v. Sappington, 68 Mo. 455; Donnan v. Intelligencer etc. Co. 70 Mo. 168; Waits v. McClure, 10 Bush, 763; Barber v. Reynolds, 33 Cal. 497; Mott v. Ruenbuhl, 1 Tex. Ct. App. (Civ. Cas.) § 599; Walker v. Deaver, 79 Mo. 664.

3 Zabriskie v. Smith, 13 N. Y. 322; Ingraham v. Baldwin, 12 Barb. 18; Depuy v. Strong, 4 Abb. Pr. N. S. 340; 37 N. Y. 372; Maxwell v. Pratt, 24 Hun, 448.

4 McCormick v. Blossom, 40 Iowa, 256; Ryan v. Mullinix, 45 Iowa, 631; Dewey v. Moyer, 9 Hun, 473; 72 N. Y. 70; Zimmermann v. Schoenfeldt, 3 Hun, 692; Lowry v. Harris, 12 Minn. 255.

5 *Blakeley v. Le Due*, 22 Minn. 476; *Lowry v. Harris*, 12 Minn. 255; *Rowe v. Baccigalluppi*, 21 Cal. 633; *Trenor v. Central Pacific R. R.* 50 Cal. 222; *Lee v. Wilkes*, 27 How. Pr. 336; 19 Abb. Pr. 355; *Conklin v. Barton*, 43 Barb. 435; *Hoop v. Plummer*, 14 Ohio St. 448; *Albro v. Lawson*, 17 Mon. B. 642; *Bouton v. Orr*, 51 Iowa, 475; *Dreutzer v. Lawrence*, 53 Wis. 594; *Spencer v. Van Cott*, 2 Utah, 342; *Adger v. Pringle*, 11 S. C. 543; *Baldwin v. Caulfield*, 26 Minn. 58; *Rutenburg v. Main*, 47 Cal. 214; *Featherston v. Norris*, 7 S. C. 472; *Tarbox v. Gorman*, 81 Minn. 62.

6 *Wooster v. Chamberlain*, 28 Barb. 602; *Newbould v. Warren*, 14 Abb. Pr. 80; *Littell v. Sayre*, 7 Hun, 458; *Moore v. Hegeman*, 6 Hun, 290.

7 *Stockwell v. Wager*, 30 How. Pr. 271.

8 *Burgess v. Abbott*, 6 Hill, 141; *Scofield v. Van Syckle*, 23 How. Pr. 97; *Taylor v. Richards*, 9 Bosw. 670.

9 *Eaton v. Balcom*, 33 How. Pr. 80; *Porter v. Fletcher*, 25 Minn. 493; *Green v. Lippincott*, 53 How. Pr. 33. And see *Sanders v. Village of Yonkers*, 63 N. Y. 489; *Earle v. Scott*, 50 How. Pr. 506.

10 *Depuy v. Strong*, 37 N. Y. 372; 4 Abb. Pr. N. S. 340.

11 *Maxwell v. Pratt*, 24 Hun, 448.

12 *Trenor v. Central Pacif. R. R.* 50 Cal. 222; *McRoberts v. Railroad Co.* 18 Minn. 108, 110; *Patchin v. Peck*, 38 N. Y. 39. Compare *Schaeffer v. Marienthal*, 17 Ohio St. 183; *Borges v. O'Neils*, 13 Ohio St. 72.

13 *Eaton v. Balcom*, 33 How. Pr. 80.

14 *Bronson v. Insurance Co.* 85 N. C. 411.

15 *Bronson v. Insurance Co.* 85 N. C. 411; *Hammond v. Hudson River etc. Co.* 20 Barb. 378. And see *Long v. Bank*, 81 N. C. 41; *Hughes v. Whitaker*, 84 N. C. 640.

16 *Porter v. Fletcher*, 25 Minn. 493. And see *McCormick v. Blossom*, 40 Iowa, 258; *Sherman v. Parish*, 53 N. Y. 483. Compare *Baker v. Hawkins*, 29 Wis. 576.

17 *Skinner v. Stewart*, 13 Abb. Pr. 442; *Baker v. Drury*, 29 Wis. 580; *Dewey v. State*, 91 Ind. 182. And see *Dias v. Bouchaud*, 10 Paige, 445; *Newcome v. Wiggins*, 78 Ind. 315.

18 *Wallace v. Eaton*, 3 Code R. 161; 5 How. Pr. 99.

19 *Wallace v. Eaton*, 3 Code R. 161; 5 How. Pr. 99; *Snyder v. Voorhes*, 7 Colo. 296.

§ 52. *Causes of action improperly united.*—That several causes of action have been improperly united, when the defect appears upon the face of the complaint or petition, is also a specified ground of demurrer under the Code system of pleading.¹ And it has generally been held that the defect is waived unless taken advantage of by demurrer.² But according to other authorities, it seems that the objection may also be made by answer;³ though, if not taken by demurrer or answer, it is undoubtedly waived.⁴ The design of a

demurrer, on the ground of misjoinder of actions, is to compel the plaintiff to elect upon which of two or more causes of action improperly united he will proceed, and this should be construed as referring to two or more "good causes" of action well pleaded.⁵ A complaint which sets forth a single cause of action, but asking several distinct forms of relief, all properly obtainable under the facts stated, is not demurrable on the ground of misjoinder of actions.⁶ Nor is a complaint demurrable on this ground, for the defect of not separately stating two or more causes of action, they being such as might, if properly stated, be united in one complaint;⁷ the proper remedy in such case is by motion.⁸ But if a complaint contains several causes of action, and they are improperly united, the omission to state the causes of action in separate counts, properly numbered, does not deprive the defendant of the right to demur.⁹ Nor is a demurrer for misjoinder of actions to be defeated by claiming that the pleading fails to state more than one good cause of action;¹⁰ the pleader having assumed to allege one, cannot claim failure as a shield.¹¹ If the complaint contains but a single cause of action, although stated in different counts, each professing to be a separate cause of action, the defendant cannot successfully demur on the ground that several causes of action are improperly united.¹² A demurrer for misjoinder of causes of action should specify the several causes of action claimed to be improperly united, otherwise the question of misjoinder will not be considered.¹³ The test by which it is determined, whether more than one cause of action has been stated in the pleading, is the question whether there is a plurality of rights to be enforced, or of wrongs to be redressed.¹⁴ The unity of the right to be enforced, or of the wrong to be redressed, constitutes the unity of

the action, however many steps may be necessary to enforce the right or redress the wrong.¹³

1 N. Y. Code Civ. Proc. § 488, subd. 7; 2 Ohio Rev. Stats. § 5062, subd. 6; Goldberg v. Utley, 60 N. Y. 427; Averill v. Barber, 20 N. Y. Week. Dig. 11; Green v. Taney, 7 Colo. 27d. See as to what actions may be properly united, § 37, *ante*.

2 Blossom v. Barrett, 37 N. Y. 434; Finley v. Hayes, 81 N. C. 368; McMillan v. Edwards, 75 N. C. 81; Field v. Hurst, 9 S. C. 277; Simpson v. Greely, 8 Kan. 588; Haverstick v. Trudel, 51 Cal. 431; Fuhr v. Weber, 38 Cal. 636; Learned v. Castle, Sup. Ct. Cal. 3 West C. Rep. 154; Anderson v. Hill, 53 Barb. 233; Sherman v. Inman Steamship Co. 26 Hun, 107; Crawfordsville v. Bond, 96 Ind. 233.

3 James v. Wilder, 25 Minn. 305; Cloon v. City Insurance Co. 1 Handy, 32. In Arkansas, motion, and not demurrer, is the remedy; Terry v. Rosell, 32 Ark. 478; and in Dakota, the objection may be taken by demurrer or by motion: Fraley v. Bentley, 1 Dakota, 23.

4 McCarthy v. Garroghty, 10 Ohio St. 438; Turner v. Althaus, 6 Neb. 54; Berry v. Carter, 1 Kan. 135; White v. Delschneider, 1 Oreg. 254; Jones v. Hughes, 16 Wis. 683; Marius v. Bicknell, 10 Cal. 217.

5 Sullivan v. N. Y. etc. R. R. Co. 1 Civ. Proc. R. 235; 19 Blatchf. 383.

6 Lattin v. McCarthy, 41 N. Y. 107. If the facts stated in a complaint constitute a single cause of action, and the prayer is for inconsistent forms of relief, the remedy is by motion and not demurrer: Colstrum v. Railroad Co. 31 Minn. 367.

7 Anderson v. Hill, 53 Barb. 233; Tisdale v. Moore, 8 Hun, 12; Bass v. Comstock, 36 How. Pr. 382; 34 N. Y. 21; Sentinel Co. v. Thomson, 33 Wis. 489; Colton v. Jones, 7 Robt. 164. And see Dawson v. Lall, 1 Ariz. 490; 3 West C. Rep. 336.

8 Freer v. Denton, 61 N. Y. 492; Ridenour v. Mayo, 29 Ohio St. 144; Adams v. Secor, 6 Kan. 547; State v. Davis, 35 Mo. 406; Wabash etc. R. R. Co. v. Rooker, 90 Ind. 531.

9 Wiles v. Suydam, 64 N. Y. 173; Goldberg v. Utley, 60 N. Y. 427; Wright v. Conner, 34 Iowa, 240.

10 Higgins v. Crichton, 63 How. Pr. 354; 2 Civ. Proc. R. 317.

11 Higgins v. Crichton, 63 How. Pr. 354.

12 Hillman v. Hillman, 14 How. Pr. 456; Ward v. Ward, 5 Abb. Pr. N. S. 145; Everett v. Waymire, 30 Ohio St. 308; Andrews v. Alcorn, 13 Kan. 351.

13 Haverstick v. Trudel, 51 Cal. 431. See § 44, *ante*.

14 Meyer v. Van Collem, 28 Barb. 230; 7 Abb. Pr. 222.

15 Meyer v. Van Collem, 23 Barb. 230; 7 Abb. Pr. 222; 2 Wait's Pr. 451.

§ 53. **No cause of action.**—The defendant may also demur to the complaint or petition if it does not state facts sufficient to constitute a cause of action.¹ But it need allege only facts sufficient to constitute a *prima facie* cause of action;² and a demurrer cannot be sus-

BOONE PLEAD.—8.

tained upon this ground unless it is apparent that, taking all the allegations to be true, no cause of action is stated.³ The general rule is, if the complaint does not state a case upon which, if uncontradicted, the plaintiff has a right to recover, a demurrer is the proper remedy.⁴ Or if the complaint omits a material fact necessary to the plaintiff's cause of action, a demurrer for the want of sufficient facts will be sustained.⁵ So a demurrer will be sustained where the complaint fails to show any connection between the facts alleged and a party defendant, by whom the demurrer is interposed.⁶ But a joint demurrer by several defendants cannot be sustained if the complaint states a good cause of action against either of the parties demurring.⁷ And a general demurrer to a complaint or petition which contains several causes of action cannot be sustained if any one of them is good.⁸ If the complaint or petition contains the elementary constituents of a good cause of action, presented in any aspect, a demurrer thereto will be overruled,⁹ even though the cause of action be not the one intended.¹⁰ The proper remedy for a defective or imperfect statement of facts is a motion to make the complaint or petition more certain and specific in that respect, and not a demurrer for the want of facts.¹¹ So a complaint which avers facts entitling the plaintiff to some relief, though not to all the relief prayed, is sufficient to repel a demurrer thereto for want of facts.¹² But it is held that a demurrer interposed to a complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, should be sustained, if the facts stated in the complaint do not entitle the plaintiff to the relief specifically demanded therein, even though they would have entitiled him to some other or different relief had he demanded it.¹³ Whether or not a cause of action is stated in a complaint depends upon an adjudi-

cation by the court, and until so decided its averments must be deemed sufficient.¹⁴ A demurrer to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, may state the objection in the language of the statute.¹⁵ But in such demurrer the word "complaint" is not equivalent to the words "cause of action," prescribed by statute.¹⁶ A demurrer to a complaint for a want of sufficient facts presents no question as to the jurisdiction of the court;¹⁷ nor does it have any applicability to the capacity of the plaintiff to sue;¹⁸ nor does it reach a defect of parties;¹⁹ nor extend to a date in the jurat to the verification;²⁰ nor, it seems, to the caption of a complaint or petition in which there is a misnomer.²¹ Under the Code system of pleading, causes of demurrer must conform to the specifications of the statute.²²

1 N. Y. Code Civ. Proc. § 488, subd. 8; Cal. Code Civ. Proc. § 430, subd. 6; N. C. Code Civ. Proc. § 95, subd. 6; 2 Ohio Rev. Stats. § 5062, subd. 8; *Trumbo v. Finley*, 18 S. C. 305; *Willard v. Comstock*, 53 Wis. 555; *Powell v. Allen*, 75 N. C. 450. And he may demur on this ground at any stage of the case: *People v. Booth*, 32 N. Y. 397; *Gray v. Palmer*, 2 Robt. 500; *Gould v. Glass*, 19 Barb. 179; *Hayes v. Lewis*, 17 Wis. 210; but the demurrer goes only to defects of substance, not of form: *Morrow v. Lawrence Univ.* 7 Wis. 574; *Bach v. Bell*, 7 Wis. 433; *Mills v. Rice*, 3 Neb. 87; *Loomis v. Tift*, 16 Barb. 541; *Marie v. Garrison*, 83 N. Y. 14; *Childers v. Verner*, 21 S. C. 4; *Wallace v. Hunt*, 22 Tex. 647; *Moreland v. Atchison*, 34 Tex. 355; *McCall v. Sullivan*, 1 Tex. Ct. App. (Civ. Cas.) § 1; *Harrington v. Galveston Co.* 1 Tex. Ct. App. (Civ. Cas.) § 792.

2 *Campbell v. Taylor*, Sup. Ct. Utah, 3 West C. Rep. 541.

3 *Houghtaling v. Hills*, 58 Iowa, 287; *Pierson v. McCurdy*, 61 How. Pr. 134; *Fleischmann v. Bennett*, 23 Hun, 200; 87 N. Y. 231; *Calvo v. Davies*, 8 Hun, 222; 73 N. Y. 211; *Kuehnemundt v. Hear*, 14 Jones & S. 188.

4 *People v. Mayor etc.* 28 Barb. 240; 17 How. Pr. 56; 8 Abb. Pr. 7; *Spear v. Downing*, 34 Barb. 522; 12 Abb. Pr. 437; 22 How. Pr. 30.

5 *Van Liew v. Johnson*, N. Y. Sup. Ct. 6 Thomp. & C. 648; *White v. Brown*, 14 Abb. Pr. 232; *Johnston Harvester Co. v. Bartley*, 94 Ind. 131; *Tolmie v. Dean*, 2 Wash. T. 46; *Leak v. Commissioners etc.* 64 N. C. 132. It has been held a ground of demurrer for insufficient facts that suit was brought before the cause of action was due: *Hicks v. Branton*, 21 Ark. 186; *Harvey v. Chilton*, 11 Cal. 114. But that the objection should be raised by answer: See *Smith v. Holmes*, 19 N. Y. 271; *Mack v. Burt*, 5 Hun, 28.

6 *Sinclair v. Fitch*, 3 Smith, E. D. 677; *Chase v. Vanderbilt*, 5 Jones & S. 334; *Webb v. Vanderbilt*, 7 Jones & S. 4; *American But-*

ton Hole Co. v. Gurnee, 44 Wis. 49. A complaint by several jointly, which fails to show a joint cause of action in all, is bad on demurrer for want of sufficient facts: *Darkles v. Bellows*, 14 Ind. 64. And see § 50, *ante*.

7 *Teter v. Hinders*, 19 Ind. 93; *Axtel v. Chase*, 83 Ind. 553; *Belknap v. Caldwell*, 83 Ind. 14; *Brownson v. Gifford*, 8 How. Pr. 389; *Fish v. Hose*, 50 How. Pr. 238; *Mo. Valley Land Co. v. Bushnell*, 11 Neb. 152; *Dunn v. Gibson*, 9 Neb. 513; *McGonigal v. Colter*, 32 Wis. 614. Where two causes of action upon contract are joined in the same action, a demurrer to the complaint, upon the ground that all of the defendants are not affected by both causes, lies at the instance of a defendant who is so affected: *Nichols v. Drew*, 94 N. Y. 22.

8 *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Hyde v. Supervisors etc.*, 43 Wis. 129; *Manafield etc. R. R. Co. v. Hall*, 28 Ohio St. 310; *Bruce v. Benedict*, 31 Ark. 301; *First Nat. Bank v. How*, 28 Minn. 150; *Danahon v. County of San Miguel*, 1 New Mexico, 263; *Seaver v. Hodgkin*, 63 How. Pr. 123.

9 *Newbery v. Garland*, 31 Barb. 121; *People v. Mayor etc.*, 23 Barb. 240; 17 How. Pr. 56; *Roe v. Lincoln County*, 56 Wis. 66; *Williams v. Sexton*, 19 Wis. 42; *Williams v. Warnell*, 25 Tex. 612; *Edgar v. Galveston*, 46 Tex. 421; *Lyle v. Harris*, 1 Tex. Ct. App. (Civ. Cas.) § 71.

10 *Mackey v. Auer*, 8 Hun, 180; *Witherhead v. Allen*, 3 Keyes, 562; 4 Abb. Ct. App. 628.

11 *Wright v. Williams*, 83 Ind. 421; *Johnston Harvester Co. v. Bartley*, 94 Ind. 131; *Baxter v. State*, 9 Wis. 38; *Simpson v. Prather*, 5 Oreg. 86; *Bradley v. Parkhurst*, 20 Kan. 462; *Union Bank v. Bell*, 14 Ohio St. 200; *Everett v. Wymire*, 30 Ohio St. 303. But where a pleading is so vague as not to state a cause of action, a demurrer will lie: *City etc. v. Connersville Hydraulic Co.*, 86 Ind. 235. Under the Colorado Code the objection for uncertainty is raised by demurrer: *Manning v. Haas*, 5 Colo. 37.

12 *Bayless v. Glenn*, 72 Ind. 5; *Moritz v. Splitt*, 55 Wis. 441; *Hewitt v. Powers*, 84 Ind. 205; *Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 34; *Price v. Brown*, 60 How. Pr. 511; 10 Abb. N. C. 67; *Lockwood v. Bigelow*, 11 Minn. 113. And see *White v. Lyons*, 42 Cal. 279; *Wright v. Wright*, 54 N. Y. 437; *Canty v. Lattner*, 31 Minn. 233.

13 *Edson v. Girvan*, 29 Hun, 422. See *Kewaunee Co. v. Decker*, 30 Wis. 624. When a complaint attempts but fails to state a cause of action in equity, a general demurrer thereto will be sustained, notwithstanding allegations therein, which, if eliminated and standing by themselves, might be sufficient to constitute a cause of action at law: *Delmer v. Railroad Co.*, 57 Wis. 218; *Gormely v. Gymnastic Assoc.*, 55 Wis. 352; *Lawson v. Menasha Wooden Ware Co.*, 59 Wis. 393.

14 *Higgins v. Crichton*, 63 How. Pr. 354; 2 Civ. Proc. R. 317.

15 § 44, *ante*; *Howland v. Kenosha Co.*, 19 Wis. 247; *Monette v. Cratts*, 7 Minn. 234; *Kent v. Snyder*, 30 Cal. 666. But see *Love v. Commissioners etc.*, 64 N. C. 706. If the defendant specifies in his demurrer certain grounds of insufficiency, he can only rely upon the defects specified. But it is otherwise if the demurrer is general and without specification: *Lopez v. Central Arizona Min. Co.*, 1 Ariz. 464; *Nellis v. De Forest*, 16 Barb. 61.

16 *Pine Civil Township v. Huber Manuf. Co.*, 83 Ind. 121.

17 *Whitewater R. R. Co. v. Bridgett*, 94 Ind. 216; *Toledo etc. R. R. Co. v. Milligan*, 52 Ind. 505; *Wilson v. Mayor etc.*, 4 Smith, E. D. 706; 15 How. Pr. 500; 6 Abb. Pr. 6.

18 *Irving Nat. Bank v. Corbett*, 10 Abb. N. C. 85; *Hobart v. Frost*, 5 Duer, 671.

19 *Grain v. Aldrich*, 28 Cal. 514; *Burhop v. Milwaukee*, 18 Wis. 431. Nor an excess or misjoinder of parties: *Eldridge v. Bell*, 12 How. Pr. 547; *Schiffer v. Eau Claire*, 51 Wis. 385; *Nevil v. Clifford*, 55 Wis. 161.

20 *State Bank v. Shaw*, 5 Hun, 114.

21 *Paola Town Co. v. Krutz*, 22 Kan. 729. Nor to the prayer for judgment or relief: *Tewksbury v. Schuenberg*, 41 Wis. 584; *Colstrum v. Minneapolis etc. R. R. Co.* 31 Minn. 367; *Hiatt v. Parker*, 29 Kan. 765, 771; *Garner v. Thorn*, 56 How. Pr. 452; *Garner v. Harmony Mills*, 6 Abb. N. C. 212; *Bennett v. Preston*, 17 Ind. 291.

22 *Whitewater R. R. Co. v. Bridgett*, 94 Ind. 216. And see § 41, *ante*. Under Nebraska practice, when the objections stated in a demurrer are not those provided by the Code, it can only be considered as a general demurrer that the petition does not state facts sufficient to constitute a cause of action: *Neb. Comp. Stats.* 543, § 95; *McClary v. Sioux City etc. R. R. Co.* 3 Neb. 44. And see *Turner v. Althaus*, 6 Neb. 54, 84.

§ 54. **Ambiguity, etc.**—Generally speaking, the indefiniteness and uncertainty of a pleading, under the Codo system, cannot be remedied or taken advantage of by demurrer, but by motion only.¹ If the intention of the pleader is apparent, or the requisite allegations can be gathered from all the averments in the complaint or petition, the demurrer must be overruled, although the pleading lacks definiteness and precision, and the facts are imperfectly, informally, or only argumentatively averred.² In other words, uncertainty in a pleading is not presented by a demurrer, unless the uncertainty be such that no cause of action is stated.³ But in some of the States, as in California, for instance, it is expressly provided that a demurrer may be interposed when the complaint is "ambiguous, unintelligible, or uncertain."⁴ And it is held that if the averments in a complaint are in the alternative, the complaint is ambiguous, even if either averment states a cause of action.⁵ But it is necessary for the pleader to point out wherein the complaint is "ambiguous, unintelligible, or uncertain," or it will be disregarded.⁶ The objection to ambiguity cannot be taken under a general demurrer that the complaint does not state facts sufficient to constitute

a cause of action.⁷ So, a demurrer on the ground of ambiguity should be overruled, if enough appears to render the pleading demurred to easy of comprehension and free from reasonable doubt.⁸ The objection for uncertainty is also raised by demurrer under the Colorado Code.⁹ But in most of the States where the Code system prevails, the rule is that uncertainty in pleading can be attacked only by motion, and if from inspection of a complaint or petition the whole or any part thereof can be resolved into a cause of action, a demurrer thereto will be overruled.¹⁰ And a rule of construction adopted is, that, on demurrer, all reasonable inferences will be indulged in, in support of the pleading demurred to.¹¹

1 *Richards v. Edick*, 17 Barb. 200; *Chesbrough v. N. Y. etc. R. R. Co.* 13 How. Pr. 557; 26 Barb. 9; *People v. Ryder*, 12 N. Y. 433; *Meyer v. County of Dubuque*, 43 Iowa, 592; *Trustees etc. v. Odlin*, 8 Ohio St. 297; *Kerr v. Pece*, 27 Kan. 338. And so as it respects irrelevant or superfluous matter: *Warren v. Philips*, 30 Barb. 646; *Bostwick v. Dry Goods Bank*, 67 Barb. 449; *Ward v. Ward*, 5 Abb. N. S. 145; *Campbell v. Taylor*, Sup. Ct. Utah, 2 West C. Rep. 541. So as to multifariousness in Arkansas: *Dyer v. Jacoway*, 42 Ark. 186.

2 *Moffatt v. McLaughlin*, 13 Hun, 449; *Barkley v. Mahon*, 95 Ind. 101; *Vance v. Schroyer*, 82 Ind. 114; *Lynch v. Levy*, 11 Hun, 145; *Lorillard v. Clyde*, 86 N. Y. 384; *Marie v. Garrison*, 83 N. Y. 14.

3 *Moorman v. Shockney*, 95 Ind. 88; *City etc. v. Connersville Hydraulic Co.* 86 Ind. 235; *Pierson v. McCurdy*, 61 How. Pr. 134.

4 Cal. Code Civ. Proc. § 430, subd. 7. And see *O'Connor v. Frasher*, 53 Cal. 435; *Tibbets v. Riverside etc. Co.* 61 Cal. 160; *Mendocino Co. v. Morris*, 32 Cal. 145; *Tomlinson v. Monroe*, 41 Cal. 94.

5 *Jamison v. King*, 50 Cal. 132.

6 *Lorenzana v. Camarillo*, 45 Cal. 125; *Yolo County v. Sacramento*, 36 Cal. 193.

7 *Slattery v. Hall*, 43 Cal. 191.

8 *Salmon v. Willson*, 41 Cal. 595.

9 *Manning v. Haas*, 5 Colo. 37.

10 *Simpson v. Prather*, 5 Oreg. 86; *Turner v. Killian*, 12 Neb. 580; *Bradley v. Parkhurst*, 20 Kan. 462; *Union Bank v. Bell*, 14 Ohio St. 208; *Everett v. Waymire*, 30 Ohio St. 308; *Williamson v. Yingling*, 93 Ind. 44; *Lewis v. Edwards*, 44 Ind. 333. A complaint stating facts constituting a cause of action, but also stating facts which constitute a defense, will be considered together as not stating a cause of action, on a demurrer to the complaint: *Calvo v. Davies*, 8 Hun, 222; 73 N. Y. 211; 29 Am. Rep. 130; *Behrley v. Behrley*, 93 Ind. 255; *Kuehnemundt v. Haar*, 14 Jones & S. 188. So, if a pleading is incomprehensible, because blanks are left where dates should have been

inserted, it is demurrable: *Knightstown Bank v. Deltch*, 83 Ind. 131; but it is not demurrable because of an error clearly clerical, by which parties have not been misled: *Roussel v. St. Nicholas Ins. Co.* 9 Jones & S. 279; 52 How. Pr. 495; *Fay v. McKeever*, 59 Cal. 307; *Fickett v. Brice*, 22 How. Pr. 194.

11 *Lorillard v. Clyde*, 86 N. Y. 384; *Marie v. Garrison*, 83 N. Y. 14; *Bushey v. Reynolds*, 31 Ark. 662.

§ 55. Demurrer bad in part.—A demurrer must be sustained or fail to the whole extent to which it is applied, and cannot be treated as bad in part and in part good.¹ Thus, it is well settled, that if a complaint or petition contains several distinct causes of action, a demurrer to the whole pleading cannot be sustained if either of the causes of action is good and well pleaded.² The pleader must stand upon his general proposition, and the court must pass upon it as an entirety, and cannot overrule the demurrer as to one paragraph and sustain it as to another.³ So, if a complaint against two or more defendants states facts constituting a good cause of action against any one of them, a joint demurrer by all, for want of sufficient facts, should be overruled.⁴ So, if a demurrer is interposed to a complaint containing two causes of action, of a nature that admits of their being united, but of one of which the court has no jurisdiction, it will be overruled if it is to the whole complaint, and assigns no cause of demurrer except that several causes of action are improperly united.⁵ In such case, the demurrer should be limited to the cause of action of which the court has no jurisdiction.⁶ It is irregular to file two demurrers to the same pleading without leave of court;⁷ but where two demurrers were filed to a complaint, one for its failure to state facts sufficient to constitute a cause of action, and the other for its misjoinder of causes of action, and no objection was taken, it was held that they should be treated as one demurrer on two grounds.⁸ A demurrer must reach the whole of a cause of action, and a

paragraph cannot be expunged on demurrer unless it amounts to a separate cause of action, and is so stated.⁹ It is said that "a demurrer is not a pruning hook, with which to rid a pleading of foreign or improper matter, nor is it a sword with which to attack and cut off redundant or impertinent averments in a pleading."¹⁰ If a count in a complaint or petition sufficiently states a cause of action, it is not vulnerable to a demurrer, although it may also contain much matter that is redundant, impertinent, or scandalous.¹¹

1 Peabody v. Insurance Co. 20 Barb. 339; People v. Morrill, 26 Cal. 360. If a portion of a complaint is defective, such defect must be reached by a special demurrer, and not by a general demurrer to the whole complaint: Lafleur v. Douglass, 2 Wash. T. 185.

2 Hyde v. Supervisors etc. 43 Wis. 129; Potter v. Hussey, 1 Utah, 249; Wheeler v. Life Ins. Co. 82 N. Y. 543; Butler v. Wood, 10 How. Pr. 222; Seaver v. Hodgkin, 63 How. Pr. 128; Warner v. Capps, 37 Ark. 32; Bruce v. Benedict, 31 Ark. 301; Weaver v. Conger, 10 Cal. 233; Carson v. Cock, 50 Tex. 325.

3 Archer v. Nat. Ins. Co. 2 Bush, 226. And see State v. Shields, 56 Ind. 521.

4 Dunn v. Gibson, 9 Neb. 513; Hale v. Omaha Nat. Bank, 49 N. Y. 627; Wilkerson v. Rust, 57 Ind. 172; Powers v. Bumbartz, 12 Ohio St. 273; Gonceller v. Forst, 4 Minn. 13; Craig v. Donovan, 63 Ind. 513; Carter v. Zenblin, 64 Ind. 436.

5 Cook v. Chase, 3 Duer, 643.

6 Cook v. Chase, 3 Duer, 643.

7 Hackett v. Carter, 38 Wis. 394.

8 Hackett v. Carter, 38 Wis. 394.

9 Ransom v. McClees, 64 N. C. 17; Bougher v. Scobey, 16 Ind. 151; Mattoon v. Baker, 24 How. Pr. 329; Daniels v. Bradley, 4 Minn. 158; Beals v. Beals, 27 Ind. 77; Locke v. Peters, Sup. Ct. Cal. 3 Pacif. L. Rep. 657.

10 Cole, J., in Hayden v. Anderson, 17 Iowa, 158.

11 Hayden v. Anderson, 17 Iowa, 158; Judah v. Vincennes Univ. 23 Ind. 273; Ward v. Ward, 5 Abb. Pr. N. S. 145; King v. Enterprise Ins. Co. 45 Ind. 43.

2 56. When demurrer adjudged frivolous. — A demurrer is frivolous when the court can say, upon a bare inspection of the pleading, without argument, that it is manifestly bad.¹ The demurrer must be not merely without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection,

and indicates that it was interposed in bad faith ;² if any argument is required to show that the demurrer is bad, it is not frivolous.³ A demurrer will be held frivolous where there is a decision in point, sustaining the pleading to which the demurrer is interposed.⁴ Thus, a complaint being held by reported cases to be sufficient, a demurrer to it, on the ground that it does not state facts sufficient to constitute a cause of action, must be treated as frivolous, although it might not be frivolous if the question were *res nova*.⁵ So, if a complaint is framed in accordance with a form expressly authorized in special cases, a demurrer thereto will be held frivolous.⁶

1 *Ferguson v. Troop*, 16 Wis. 571.

2 *Cook v. Warren*, 83 N. Y. 37.

3 *Cook v. Warren*, 83 N. Y. 37. And see *Strong v. Sproul*, 53 N. Y. 497.

4 *Bank of Wilmington v. Barnes*, 4 Abb. Pr. 226 ; *Swinburne v. Stockwell*, 53 How. Pr. 522.

5 *Phelps v. Ferguson*, 19 How. Pr. 143 ; 9 Abb. Pr. 206. And see *Chauncey v. Lawrence*, 15 Abb. Pr. 106.

6 *Greenburg v. Wilkins*, 9 Abb. Pr. 206, n.

§ 57. **Amendments after decision of demurrer.**—When judgment is given on a demurrer, in favor of the defendant, the demurrer is said to be allowed.¹ And upon the allowance of a demurrer, it is competent for the plaintiff to amend, and to remove the objection, if he may be able to do so.² But leave to amend need not be granted unless asked for ;³ and it lies absolutely in the discretion of the court, to be exercised in the furtherance of justice, whether or not to permit the party to amend.⁴ And it is held not to be in furtherance of justice to allow an amendment, with no other view than that the plaintiff might have the privilege of looking about to see if he could not discover some means of re-enforcing his case.⁵ If, therefore, it appears to the court that the complaint cannot be so amended as to enable the plaintiff to recover, the defendant is entitled to judgment absolute,

upon the demurrer.⁶ And after an amended complaint has been held insufficient on demurrer, leave to amend a second time should not ordinarily be granted.⁷ And where the court below sustains a demurrer to a complaint, and the plaintiff afterwards files a new and amended complaint, he thereby waives any error that may have been committed in sustaining the demurrer to the first pleading.⁸ The filing of a new complaint after a demurrer sustained is not the commencement of a new action;⁹ the amended complaint takes the place of the original, and when it is filed the original ceases to perform any further functions as a pleading.¹⁰ Upon the demurrer being overruled, it lies in the discretion of the court to permit the defendant to plead anew or amend,¹¹ but such permission will not be given, unless it satisfactorily appears to the court that the demurrer was interposed in good faith, with a view of disposing of the case upon the merits, and not in the mere hope of success.¹² Where a demurrer to a complaint is overruled, with leave to answer within a certain time, the judgment entered upon failure to answer is final, and leave to answer cannot be afterwards given.¹³

1 2 Walt's Pr. 455.

2 Meyer v. County of Dubuque, 43 Iowa, 592; Gallagher v. Delaney, 10 Cal. 410.

3 Devoss v. Gray, 22 Ohio St. 153. And see Yreka Wat. Co. 14 Cal. 201.

4 Lowry v. Inman, 37 How. Pr. 286; 6 Abb. Pr. N. S. 394; 2 Sweeny, 117; Bonfield v. Price, 1 Wyom. 172. See N. Y. Code Civ. Proc. § 497; Robinson v. Judd, 9 How. Pr. 373. As to the entry of an interlocutory judgment on sustaining demurrer, see Liegeois v. McCrackan, 22 Hun, 69.

5 Lowry v. Inman, 37 How. Pr. 286; 6 Abb. Pr. N. S. 394; 2 Sweeny, 117.

6 Snow v. Fourth Nat. Bank, 7 Robt. 479; Lord v. Hopkins, 30 Cal. 76.

7 Lowry v. Inman, 37 How. Pr. 286; 6 Abb. P. N. S. 394. And see Gallagher v. Delaney, 10 Cal. 410.

8 Rosa v. Mo. etc. R. R. Co. 13 Kan. 124. And see § 46, ante.

9 Jones v. Frost, 23 Cal. 245.

10 Barber v. Reynolds, 33 Cal. 497. And see Sands v. Calkins, 30 How. Pr. 1.

11 Bonnifield v. Price, 1 Wyom. 172.

12 Osgood v. Whittelsey, 10 Abb. Pr. 134; 20 How. Pr. 72. See § 46, *ante*.

13 Fisher v. Gould, 9 Daly, 144. And see Whiting v. Mayor etc. 37 N. Y. 600. The defendant may serve an answer at any time within twenty days after the service of a demurrer to the complaint, as a matter of course, to take the place of the demurrer, and as an amended pleading: People v. Whitewell, 4 N. Y. Month. Law Bull. 21. See Brown v. Leigh, 49 N. Y. 78.

CHAPTER IV.

THE ANSWER.

- § 58. Definition and nature of.
- § 59. What to contain, generally.
- § 60. Denials, general or specific.
- § 61. Denials must be direct and positive.
- § 62. Denying knowledge or information.
- § 63. What may or may not be denied.
- § 64. Effect of omission to deny.
- § 65. What may be shown under general denial.
- § 66. Pleading new matter in defense.
- § 67. Particular defenses — How interposed.
- § 68. Statute of frauds.
- § 69. Statute of Limitations.
- § 70. Pleading statutes, generally.
- § 71. Consideration.
- § 72. Justification.
- § 73. Leave and license.
- § 74. Negligence.
- § 75. Denials of damages.
- § 76. Matter in aggravation.
- § 77. Partial defenses.
- § 78. Joinder of defenses.
- § 79. Joint answers.
- § 80. Each defense to be complete.
- § 81. Subscription — Verification.
- § 82. Verification, by whom and how made.
- § 83. Supplemental answer.

§ 58. **Definition and nature of.** — Under the Code system, the only pleading on the part of the defendant is either a demurrer or an answer.¹ And generally speaking, when any of the matters enumerated by the statute as grounds of demurrer do not appear upon the face of the complaint or petition, the defendant's remedy is by answer.² The word "answer" is sometimes used in a general sense, so as to signify any pleading by which an issue, whether of law or of fact, is made or tendered

on the part of the defendant.³ In this liberal sense, a demurrer is an answer to a complaint.⁴ But demurrer and answer are clearly distinct pleadings under the Code system, the former tendering an issue of law and the latter an issue of fact;⁵ and a demurrer can never be held to be included in the term "answer," unless the context or manifest purpose of the term shows that it was so intended.⁶ It should also be observed that the word "answer," as used in the Codes of the different States, means an entire answer as a distinct pleading, and not one or more of several defenses constituting the answer.⁷ Under the Codes of some of the States, the defendant may demur and answer at the same time to the entire complaint, and also to each cause of action therein stated.⁸ But the prevailing doctrine is, that a demurrer and answer to the same cause of action at the same time is not allowable.⁹ And in order to ascertain and determine whether a defense is a demurrer or an answer, it is only necessary to ascertain whether it requires that any facts should be proved or not;¹⁰ if the slightest statement of facts is necessary to reveal the defect in the complaint, the defense must be made by answer and not by demurrer.¹¹

1 See N. Y. Code Civ. Proc. § 487; Cal. Code Civ. Proc. § 422.

2 See N. Y. Code Civ. Proc. § 423; *Webb v. Vanderbilt*, 7 Jones & S. 4; *Zabriskie v. Smith*, 13 N. Y. 322.

3 *Howell v. Howell*, 15 Wis. 55.

4 *Broadhead v. Broadhead*, 4 How. Pr. 303.

5 *Brennan v. Ford*, 46 Cal. 7; *Kelly v. Downing*, 42 N. Y. 71, 77; N. Y. Code Civ. Proc. § 963.

6 *Kelly v. Downing*, 42 N. Y. 77. A demurrer precedes an answer, and cannot be put in after it, without leave obtained to withdraw the answer: *Finch v. Baskerville*, 85 N. C. 205.

7 *Strong v. Sprout*, 53 N. Y. 437.

8 See *People v. McClellan*, 31 Cal. 101; *Wines v. Stevens*, 1 Utah. 305, 308.

9 *Spellman v. Welder*, 5 How. Pr. 5; *Munn v. Barnum*, 1 Abb. Pr. 231; 12 How. Pr. 563; *Von Glahn v. De Rossett*, 76 N. C. 292; *Davis v. Hines*, 6 Ohio St. 473; *San Juan etc. Smelting Co. v. Finch*, 6 Colo. 223.

10 *Struver v. Ocean Ins. Co.* 16 How. Pr. 422.

11 *Struver v. Ocean Ins. Co.* 16 How. Pr. 422; *Dillaye v. Willson*, 43 Barb. 291; *Brennan v. Ford*, 46 Cal. 7.

§ 59. *What to contain, generally.*—As generally prescribed under Code pleading, the requisites of an answer are: (1) A general or specific denial of each material allegation of the complaint or petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition.¹ The answer should be entitled in the action, specifying the name of the court, of the county, and also the names of the parties, plaintiff and defendant, and this is specifically required by the statute in some of the States.² But an answer is not required to contain any prayer for relief, except where affirmative relief is sought,³ nor any statement as to what the defendant may consider to be the legal effect of the facts he sets up.⁴ It is sufficient if the facts which he avers constitute matter either in bar or abatement; and the plaintiff must himself determine, at his own peril, whether the facts are sufficient and sufficiently averred to constitute a defense, either in bar or in abatement.⁵ The facts constitute the defense, and misnaming the pleading is immaterial, since it will be tested by the facts, whether it is called by the right name or not.⁶ Generally speaking, a defendant should set forth the true nature of his defense in his answer, and in case he does not, he should not be permitted to insist upon it.⁷ Under the Code system, only two classes of defense are allowed—the first consisting of a simple denial, and the second, of the allegation of new affirmative matter.⁸ The answer should either take issue directly on the material allegations of the complaint, or, confessing

them, should state distinctly and positively new matter sufficient to avoid them.⁹ But it is no objection to an answer, that after taking issue upon the material allegations in the complaint, it alleges, as a defense, matter operating in abatement, or as a perpetual bar.¹⁰

1 See N. Y. Code Civ. Proc. § 500; Cal. Code Civ. Proc. § 437; Dakota Code Civ. Proc. § 118; 2 Iowa Rev. Code (1880) § 2855; 2 Ohio Rev. Stats. § 5070; N. C. Code Civ. Proc. § 100; Minn. Stats. (1878) p. 720, § 96; *Burley v. German Am. Bank*, 5 Civ. Proc. R. 172.

2 See 2 Iowa Rev. Code (1880) § 2855, subd. 1. Compare *Didler v. Warner*, 1 Code R. 42.

3 *Bridge v. Payson*, 5 Sand. 210; *Bendit v. Annesley*, 42 Barb. 192; 27 How. Pr. 184; *Dawley v. Brown*, 9 Hun, 461.

4 *Dawley v. Brown*, 9 Hun, 461. Nor is it necessary, after inserting in an answer a statement which shows that the plaintiff ought not to recover, to accompany it with the reasons why he should not recover: *Bridge v. Payson*, 5 Sand. 210.

5 *Dawley v. Brown*, 9 Hun, 461.

6 *Springer v. Dwyer*, 50 N. Y. 19.

7 *Walton v. Minturn*, 1 Cal. 362; *Bernard v. Mullott*, 1 Cal. 363.

8 *Ladd v. Stevenson*, 1 Cal. 18; *Piercy v. Sabin*, 10 Cal. 22; *Glazer v. Cliff*, 10 Cal. 303; *Coles v. Soulsby*, 21 Cal. 50; *Gould v. Williams*, 9 How. Pr. 51.

9 *Ladd v. Stevenson*, 1 Cal. 18.

10 *Bridge v. Payson*, 5 Sand. 210; *Sweet v. Tuttle*, 10 How. Pr. 40; 14 N. Y. 465; *Gardner v. Clark*, 21 N. Y. 399; *Erb v. Perkins*, 32 Ark. 423; *Bond v. Wagner*, 28 Ind. 462; *Board of Supervisors v. Van Stralen*, 45 Wis. 875; *Woody v. Jordon*, 69 N. C. 189. Compare *Fordyce v. Hathorn*, 57 Mo. 120; *Hopwood v. Patterson*, 2 Oreg. 49. An answer may confess and avoid some averments of the complaint and deny the others: *Carter v. Ford Plate Glass Co.* 85 Ind. 180; *State v. St. Paul etc. Turnp. Co.* 92 Ind. 42.

§ 60. **Denials, general or specific.**—By a general denial is meant a denial in gross of all the allegations of the complaint or petition;¹ a specific denial is a denial applicable only to the particular allegation controverted.² A general and specific denial is not permitted to the same allegation.³ But it is held that a defendant may admit one or more special allegations, and deny the remainder by a general allegation, when the allegations are so specified that there can be no mistake in ascertaining what is put in issue.⁴ Thus, an answer denying “each and every allegation set forth in the

complaint, except as herein admitted, qualified, or explained," was sustained as proper.⁵ But the common form of a general denial is, that "the defendant denies each and every allegation of the complaint," and in this form the denial puts in issue every fact alleged in the complaint.⁶ It is also held that a denial of all the allegations which are contained within certain specified folios is good as a general denial.⁷ So, a denial in the form, "*he says* that he denies each and every allegation," is a good general denial.⁸

1 Wand v. Packard, 13 Cal. 391; Dennison v. Dennison, 9 How. Pr. 246. A verified answer which interposes a general denial to the complaint is tantamount to a plea of the general issue under common-law practice: Thompson v. Erie R. R. Co. 45 N. Y. 468.

2 San Francisco Gas Co. v. San Francisco, 9 Cal. 453. Under the Colorado Code, there is no such thing as a general denial, and a specific denial of each allegation in the complaint intended to be controverted is required: Alden v. Carpenter, 4 Colo. L. R. 430.

3 Blake v. Eldred, 18 How. Pr. 240; Fogerty v. Jordan, 2 Robt. 319, 322.

4 Haines v. Herrick, 9 Abb. N. C. 379. And see McGuinness v. Mayor, 13 N. Y. Week. Dig. 522; Blake v. Eldred, 18 How. Pr. 240; Long v. Long, 79 Mo. 644, Smith v. Wells, 20 How. Pr. 138. But see Leary v. Boggs, 3 Civ. Proc. R. 227; Miller v. McCloskey, 9 Abb. N. C. 303; 1 Civ. Proc. R. 259; Hammond v. Earle, 5 Abb. N. C. 105; Clark v. Dillon, 2 Civ. Proc. R. 73; 4 Civ. Proc. R. 245; McEncroe v. Decker, 53 How. Pr. 250; Bixby v. Drexel, 9 Reporter, 630; Luce v. Alexander, 17 Jones & S. 202; Thierry v. Crawford, 33 Hun, 366.

5 Calhoun v. Hallen, 25 Hun, 155; Allis v. Leonard, 46 N. Y. 683; 22 Alb. L. J. 23; Parshall v. Tilton, 13 How. Pr. 7; Burley v. German Am. Bank, U. S. Sup. Ct. 5 Civ. Proc. R. 172. But see 5 Civ. Proc. R. 179, n.

6 Wand v. Packard, 13 Cal. 391; Mattison v. Smith, 19 Abb. Pr. 283; 1 Robt. 706; Kellogg v. Church, 3 Code R. 39; 4 How. Pr. 339. Thompson v. Erie R. R. Co. 45 N. Y. 474. The mere form of the denials in the answer is not material if they meet and traverse the allegations of the complaint: Morrison v. O'Reilly, 2 Utah, 165.

7 Gassett v. Crocker, 9 Abb. Pr. 39. And see Brown v. Cooper, 89 N. C. 237. Contra, Collins v. Singer Manuf. Co. 53 Wis. 305.

8 Espinosa v. Gregory, 40 Cal. 61; Moen v. Eldred, 22 Minn. 538; Jones v. Ludlum, 74 N. Y. 61; Chapman v. Chapman, 34 How. Pr. 281; Munn v. Taulman, 1 Kan. 254. But see People v. Christopher, 4 Hun, 805; Powers v. Railroad Co. 3 Hun, 285; Arthur v. Brooks, 14 Barb. 533; Smith v. Nelson, 62 N. Y. 286.

‡ 61. **Denials must be direct and positive.**—The defendant, in his answer, may deny the allegations of the complaint or petition, generally, in a short form of denial,

or he may deny them specifically.¹ But a denial in either form should, by its words, so describe the allegations of the complaint or petition which the pleader intends to controvert, that any person of intelligence can identify them.² And an answer which so denies the allegations of a complaint, that it must be left to the uncertainty of a future judicial decision to ascertain which are denied and which are not denied, is not sanctioned under Code pleading.³ It has accordingly been held, that an answer in terms merely denying "each and every *material* allegation in the complaint," is evasive, and not good pleading.⁴ So, an answer denying each and every allegation of the complaint, "in the manner and form as therein set forth," is faulty, as only referring to the manner and form in which the plaintiff has stated his cause of action, and not to the substance of the allegation.⁵ And generally speaking, a denial in the precise language of the complaint or petition is not good.⁶ Such a denial is a "negative pregnant" with an admission that the alleged facts may have transpired on some other day, or under different circumstances.⁷ Thus, a denial of an act being done "unlawfully" or "wrongfully," does not deny the act, but only the character of it.⁸ A denial of "wrongfully and illegally" diverting certain water is an admission of the act of diversion.⁹ So, if the complaint in an action of unlawful detainer avers that the defendant unlawfully entered upon the demanded premises, and the answer denies that he entered "unlawfully," it admits the entry and raises an issue only upon the question of its lawfulness.¹⁰ So, a denial that property sued for is of the exact value alleged in the complaint is an admission of any less value.¹¹ It is likewise a well-settled rule of pleading, that denials in the conjunctive form are insufficient to raise any issues, and are virtual admissions

of the truth of the allegations they were intended to deny.¹² If, therefore, several material facts are stated conjunctively in a complaint, the defendant must deny them disjunctively and not conjunctively, if he desires to put them in issue.¹³ The court will not in general give effect to a denial intended to be hypothetical.¹⁴ But hypothetical denials have been allowed in certain cases,¹⁵ as where the facts alleged in the complaint are not presumptively within the knowledge of the defendant, and where he denies any knowledge or information of such facts sufficient to form a belief.¹⁶ An argumentative denial is seldom good in pleading,¹⁷ but is sometimes allowed.¹⁸ The general rule is, that a denial, either general or specific, must be direct and unequivocal;¹⁹ and if it merely implies that the allegation is controverted, or justifies an inference that such is or will be claimed to be its effect, it will not be construed as a denial.²⁰ But a denial which is not evasive, and which directly traverses the matter alleged, is good, without regard to the mere form in which it is expressed.²¹ A denial in the alternative is a violation of the rule as to certainty and definiteness required in all pleading.²²

1 *West v. American Exchange Bank*, 14 Barb. 179; *Mattison v. Smith*, 19 Abb. Pr. 290; 1 Robt. 706. There is no such thing as a general denial under the Colorado Code: *Alden v. Carpenter*, Sup. Ct. Colo. 4 Colo. L. R. 430.

2 *Mattison v. Smith*, 19 Abb. Pr. 290; 1 Robt. 706. And see *Dougherty v. Little*, 4 Colo. L. R. 201.

3 *Mattison v. Smith*, 19 Abb. Pr. 292; 1 Robt. 710; *Miller v. McCloskey*, 1 Civ. Proc. R. 252; 9 Abb. N. C. 303.

4 *Seward v. Miller*, 6 How. Pr. 312; *Mattison v. Smith*, 19 Abb. Pr. 290; 1 Robt. 706; *Montour v. Purdy*, 11 Minn. 384; *Dodge v. Chandler*, 13 Minn. 114. But see *Miller v. Brumbaugh*, 7 Kan. 343.

5 *Dole v. Burleigh*, 1 Dakota, 227.

6 *Robbins v. Lincoln*, 12 Wis. 9; *Norris v. Glenn*, 1 Idaho, 590; *Caulfield v. Sanders*, 17 Cal. 569.

7 *Schaetzel v. Germantown etc. Ins. Co.*, 22 Wis. 412; *Davison v. Powell*, 16 How. Pr. 467; *Sallinger v. Lusk*, 7 How. Pr. 430; *Frasier v. Williams*, 15 Minn. 294; *Harden v. Atchison etc. R. R. Co.*, 4 Neb. 621; *Holden v. Kirby*, 21 Wis. 149; *Cuthbert v. City of Appleton*, 24 Wis. 383; *Shearman v. N. Y. Cent. Mills*, 1 Abb. Pr. 187; *Baldwin v. U. S.*

Tel. Co. 6 Abb. Pr. N. S. 405; 1 Lans. 125; 54 Barb. 505; Nolen v. Skelley, 62 How. Pr. 102; Lawrence v. Cabot, 9 Jones & S. 122.

8 Wood v. Richardson, 35 Cal. 49; Feeley v. Shirley, 43 Cal. 369; Larney v. Mooney, 50 Cal. 610.

9 Harris v. Shontz, 1 Mont. 212; Toombs v. Hornbuckle, 1 Mont. 286.

10 Leroux v. Murdock, 51 Cal. 541.

11 Leffingwell v. Griffen, 31 Cal. 232; Towdy v. Ellis, 22 Cal. 650; Scovill v. Barney, 4 Oreg. 288. And see Lynd v. Picket, 7 Minn. 184; Hecklin v. Ess, 16 Minn. 51; Houston v. Railroad Co. 45 Cal. 550; Conway v. Clinton, 1 Utah, 215.

12 Moser v. Jenkins, 5 Oreg. 447; Fitch v. Bunch, 30 Cal. 211; Leroux v. Murdock, 51 Cal. 541.

13 Young v. Catlett, 6 Duer, 437; Shearman v. N. Y. Cent. Mills, 1 Abb. Pr. 187; Reed v. Calderwood, 32 Cal. 109; Fish and Redington, 31 Cal. 194. Compare Thompson v. Erie Railw. Co. 45 N. Y. 468.

14 Alemany v. Petaluma, 38 Cal. 557; Lewis v. Acker, 11 How. Pr. 163; Porter v. McCreedy, 1 Code R. N. S. 88; Buddington v. Davis, 6 How. Pr. 401.

15 See Ketcham v. Zerega, 1 Smith, E. D. 553; Dovan v. Dinsmore, 20 How. Pr. 505; 33 Barb. 88; Taylor v. Richards, 9 Bosw. 679.

16 Brown v. Ryckman, 12 How. Pr. 313.

17 Morris v. Thomas, 57 Ind. 316; Lewis v. Kendall, 6 How. Pr. 59, 66; De Forrest v. Butler, 62 Iowa, 78.

18 See Loeb v. Wels, 64 Ind. 235; Simmons v. Green, 35 Ohio St. 104.

19 West v. Am. Exchange Bank, 44 Barb. 179; Harden v. Railroad Co. 4 Neb. 523.

20 West v. Am. Exchange Bank, 44 Barb. 179; Wood v. Whiting 21 Barb. 190.

21 Hill v. Smith, 27 Cal. 479; Morrison v. O'Reilly, 2 Utah, 165.

22 Corbin v. George, 2 Abb. Pr. 465; Otis v. Ross, 2 How. Pr. 193; Ladd v. Ramsby, 10 Oreg. 207. An allegation that if the plaintiff should prove certain facts the defendant will prove certain matters stating them is bad, as being contingent instead of positive: Lewis v. Kendall, 6 How. Pr. 59, 66; 1 Code R. N. S. 402.

§ 62. Denying knowledge or information. — Under the Code system of pleading, it has been very generally provided that a defendant may deny upon information and belief.¹ And any or all of the material allegations of a complaint or petition may be put at issue by an answer, that the defendant has no knowledge or information thereof sufficient to form a belief as to their truth.² But when a defendant denies that he has any knowledge or information sufficient to form a belief concerning the allegations of the complaint, he uses a strictly statutory form of issue, which he is obliged to

follow closely.³ Thus, a mere denial of any *information* sufficient to form a belief as to the truth of the matter alleged in the complaint or petition raises no issue.⁴ The denial must be of any *knowledge* as well as of any *information*.⁵ But when the denial is in this respect in the language of the statute it forms a material issue.⁶ And a denial by the defendant "*upon his information and belief*," instead of the statutory language "*according to his information and belief*," was held to be sufficient.⁷ This form of answer is said to be peculiarly proper when the defendant is ignorant of the facts alleged, and must verify his answer.⁸ And the rule in New York now is, that a party has no right to interpose an unqualified denial in a verified answer, unless it be founded upon personal knowledge;⁹ and where he has no positive knowledge, but has knowledge or information sufficient to form a belief, he is not only permitted but bound, at his peril, to deny upon information and belief.¹⁰ But the averment of a fact in an answer, which is presumptively within the knowledge of the defendant, may not be stated on information and belief, but positively;¹¹ as where the facts charged in the complaint or petition are acts alleged to have been done by the defendant himself, such facts cannot be denied on information and belief, but the denial must be direct and positive.¹² And the same principle is applicable where the acts are alleged to have been done by the defendant's agent or partner,¹³ or were done in the presence of the defendant.¹⁴ Where the obligations sued on are payable to bearer, and execution and delivery are admitted, a denial of information sufficient to form a belief whether the plaintiff is the lawful holder raises no issue.¹⁵ And it is stated as a general rule, that denial on information and belief of an instrument of record, well pleaded as to

execution, delivery, and record, does not put those facts in issue.¹⁶ The principle is, that a party cannot plead ignorance to a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact;¹⁷ therefore, if a complaint avers the making of a deed, sets it out in *hæc verba*, and states the volume and page of the records where it is recorded, a denial, in the answer, of "sufficient knowledge or information to form a belief" as to these averments, is insufficient to raise an issue.¹⁸ So, a denial by a sheriff, sued for negligence in levying an execution from his own county, of knowledge or information sufficient to form a belief as to whether the execution was issued on a valid judgment, should be disregarded.¹⁹ A corporation may deny the allegations of a complaint in an action against it on information and belief.²⁰ And in an action against a corporation, an answer which, "upon information and belief, denies each and every allegation of the complaint, except the allegation of the defendant's incorporation," creates a triable issue.²¹ Where a complaint alleges that the plaintiff is a corporation created by and under an act of the legislature, or under the laws of a foreign State, a simple allegation in the answer that the defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff is a corporation or not, created by or under the laws referred to, is not sufficient to put the plaintiff upon proof of its corporate existence, where a statute requires the plaintiff's corporate character to be *affirmatively* denied.²² So, an allegation in an answer upon information and belief, that a defendant is not and never was a corporation, does not put in issue the incorporation of the defendant.²³ The party intending to raise the issue as to the existence of the corporation should be held to a posi-

tive allegation to that effect, and this rule is especially applicable where a company holding itself out to the world as a corporation denies its own existence.²⁴ In an action against a corporation, an answer upon information and belief, admitting that both plaintiff and defendant are corporations, and denying each and every allegation of the complaint, is frivolous, and creates no issue whatever.²⁵

1 See N. Y. Code Civ. Proc. § 500; 2 Iowa Rev. Code (1880) § 2635 subd. 2; Cal. Code Civ. Proc. § 437, subd. 2; N. C. Code Civ. Proc. § 100; Colo. Code Civ. Proc. § 57; Pratt Manuf. Co. v. Jordan Iron etc. Co. 5 Civ. Proc. R. 372; People v. Curtis, 1 Idaho, 753.

2 Livingston v. Hammer, 7 Bosw. 670; Richter v. McMurray, 15 Abb. Pr. 346; Treadwell v. Commissioners, 11 Ohio St. 183; Kitchen v. Wilson, 80 N. C. 182; Farmers' etc. Bank v. City of Charlotte, 75 N. C. 45; Macclay v. Sands, 94 U. S. 586; Ames v. Railroad Co. 12 Minn. 412; Roby v. Hallock, 53 How. Pr. 412; Metras v. Pearsall, 5 Abb. N. C. 90; Richards v. Fuechsel, 5 Civ. Proc. R. 430; Henderson v. Manning, 5 Civ. Proc. R. 221; People v. Curtis, 1 Idaho, 753; Sherman v. Osborn, 8 Oreg. 66; Wilson v. Allen, 11 Oreg. 154.

3 Elton v. Markham, 20 Barb. 343; Heye v. Bolles, 2 Daly, 231; 33 How. Pr. 266; Hackett v. Richards, 3 Smith, E. D. 13. And see Sheldon v. Sabin, 4 Civ. Proc. R. 4.

4 Manny v. French, 23 Iowa, 250; Hautemann v. Gray, 5 Civ. Proc. R. 224, n.

5 Lloyd v. Burns, 6 Jones & S. 423; 62 N. Y. 651; Manny v. French, 23 Iowa, 250; People v. McCumber, 27 Barb. 632; 15 How. Pr. 186; Humphreys v. McCall, 9 Cal. 59. And see Sayre v. Cushing, 7 Abb. Pr. 371; Nichols v. Jones, 6 How. Pr. 355; Swinburne v. Stockwell, 58 How. Pr. 312.

6 McFarland v. Lester, 23 Iowa, 290; McPhail v. Hyatt, 29 Iowa, 197.

7 Jones v. Petaluma, 36 Cal. 230; Roussin v. Stewart, 33 Cal. 211; Kirstein v. Madden, 38 Cal. 163. And see Metras v. Pearsall, 5 Abb. N. C. 90; Sackett v. Hadens, 7 Abb. Pr. 371, n.

8 Snyder v. White, 6 How. Pr. 321.

9 Brotherton v. Downey, 21 Hun, 436; 59 How. Pr. 206.

10 Brotherton v. Downey, 21 Hun, 436; 59 How. Pr. 206.

11 Hanna v. Barker, 6 Colo. 303; Morton v. Jackson, 2 Minn. 219; Lawrence v. Derby, 24 How. Pr. 133; Wing v. Dugan, 8 Bush, 583. And see Capital Bank v. Rutherford, 70 Ga. 57. Compare Grocers' Bank v. O'Rourke, 6 Hun, 18; Richards v. Fuechsel, 5 Civ. Proc. R. 430.

12 Hanna v. Barker, 6 Cal. 303; Humphreys v. McCall, 9 Cal. 59; Gas Company v. San Francisco, 9 Cal. 453; Lloyd v. Burns, 6 Jones & S. 423; 62 N. Y. 651.

13 Lewis v. Acker, 11 How. Pr. 163; Beebe v. Marvin, 17 Abb. Pr. 194; Chapman v. Palmer, 12 How. Pr. 37.

14 Edwards v. Lent, 8 How. Pr. 23.

- 15 *Asiel v. Railroad Co.* 3 Month. Law Bull. 23.
- 16 *Goodell v. Blumer*, 41 Wis. 436. And see *Curtis v. Richards*, 9 Cal. 38.
- 17 *Goodell v. Blumer*, 41 Wis. 436; *Mills v. Town of Jefferson*, 20 Wis. 50; *City of Milwaukee v. O'Sullivan*, 25 Wis. 666; *Brown v. La Crosse City etc.* 21 Wis. 51. Compare *Oregonian Railw. Co. v. Oregon Railw. & Nav. Co.* Cir. Ct. Oreg. 4 West C. Rep. 548.
- 18 *Goodell v. Blumer*, 41 Wis. 436.
- 19 *Elmore v. Hill*, 46 Wis. 618.
- 20 *Macaulay v. Bromell etc. Printing Co.* 5 Civ. Proc. R. 431; *Wadleigh v. Marathon County Bank*, 53 Wis. 346.
- 21 *Macaulay v. Bromell etc. Printing Co.* 5 Civ. Proc. R. 431.
- 22 *Concordia Sav. etc. Assoc. v. Reed*, 63 N. Y. 474; 18 N. Y. Week. Dig. 169; *Crane etc. Manuf. Co. v. Morse*, 49 Wis. 368; *Brown v. City of La Crosse etc. Co.* 21 Wis. 51; *Bengston v. Thingvalla Steamship Co.* 3 Civ. Proc. R. 263; S. C. aff'd 4 Civ. Proc. R. 260; 31 Hun, 96; 18 N. Y. Week. Dig. 411; *East River Bank v. Rogers*, 7 Bosw. 493; *City Bank v. Drake*, 5 N. Y. Week. Dig. 477.
- 23 *Bengston v. Thingvalla Steamship Co.* 3 Civ. Proc. R. 263.
- 24 *Bengston v. Thingvalla Steamship Co.* 3 Civ. Proc. R. 263; S. C. aff'd 4 Civ. Proc. R. 260; 31 Hun, 96; 18 N. Y. Week. Dig. 411. And see N. Y. Code Civ. Proc. § 1776.
- 25 *Pratt Manuf. Co. v. Jordon Iron etc. Co.* 5 Civ. Proc. R. 372; 33 Hun, 143.

§ 63. What may or may not be denied.—Under the Code system of pleading, a denial is confined to such allegations only as are material.¹ And only those allegations in a complaint or petition are deemed material, which the plaintiff must prove upon the trial in order to maintain his action.² Mere matters of inducement averred in a complaint are not the subject of denial;³ so of an averment of the belief of the plaintiff, as it regards any fact;⁴ so of allegations of time, place, value, etc., when not of the substance of the issue.⁵ So, as a general rule, a mere denial of a legal conclusion puts in issue no fact alleged, and is inadmissible;⁶ such, for instance, is a denial of indebtedness,⁷ except where the indebtedness is merely pleaded as a fact.⁸ But authority to deny material allegations is not confined to such as are directly alleged;⁹ facts impliedly averred are traversable in the same manner as though directly averred.¹⁰ So when the answer puts

in issue material allegations, although its form and structure indicate that the intention of the pleader is to present a different question, yet the issues in fact presented cannot be disregarded, and the court cannot, by a summary judgment, deprive the defendant of the right of a trial of the issues thus formed.¹¹

1 *King v. Utica Ins. Co.* 6 How. Pr. 435; *Fry v. Bennett*, 5 Sand. 54. An answer need not traverse mere matters of surplusage: *Racouillat v. Rene*, 32 Cal. 450; *Pence v. Durbin*, 1 Idaho, 550.

2 *Clay County v. Simonsen*, 1 Dakota, 403; 2 Dakota, 112; *Fairchild v. Railroad Co.* 15 N. Y. 337.

3 *Fry v. Bennett*, 1 Code R. N. S. 238; 5 Sand. 54.

4 *Radway v. Mather*, 5 Sand. 654; *Walters v. Chinn*, 1 Met. (Ky.) 499.

5 *Woodruff v. Cook*, 25 Barb. 505; *Livingston v. Hammer*, 7 Bosw. 670; *Davison v. Powell*, 16 How. Pr. 467.

6 *Kay v. Churchill*, 10 Abb. N. C. 83; *Emery v. Baltz*, 34 N. Y. 408; 18 N. Y. Week. Dig. 226; *Marsh v. Elsworth*, 36 How. Pr. 532; *Frasler v. Williams*, 15 Minn. 288; *Downer v. Read*, 17 Minn. 433; *Nelson v. Murray*, 23 Cal. 338.

7 *Pierson v. Cooley*, 1 Code R. 91; *Wells v. McPike*, 21 Cal. 215.

8 *Morrow v. Congan*, 3 Abb. Pr. 323. And see *Quin v. Lloyd*, 41 N. Y. 349; *Anon.* 2 Code R. 67.

9 *Bellinger v. Crague*, 31 Barb. 534; *Prindle v. Caruthers*, 15 N. Y. 425; *Lord v. Chesebrough*, 4 Sand. 693.

10 *Marle v. Garrison*, 33 N. Y. 14.

11 *Youngs v. Kent*, 46 N. Y. 672.

2 64. **Effect of omission to deny.**—Material allegations of the complaint or petition not denied by the answer are to be taken as true, for the purposes of the action.¹ And by the term "material allegation" is meant, an allegation without proof of which the plaintiff must fail in his action.² The object sought by this feature of Code pleading is, to compel the defendant to admit every part of the plaintiff's complaint or petition which he cannot conscientiously deny;³ therefore, any fact sustaining the plaintiff's case admitted in one part of the answer is to be taken as true, and the plaintiff is not bound to prove it.⁴ And it is error for the court to instruct the jury that it is necessary for the plaintiff to prove facts alleged in the complaint, and not denied by

the answer.⁵ The failure to deny a material allegation is an admission of it, and the admission is conclusive evidence of the fact admitted.⁶ But an omission to deny any allegation, which is in any sense of the word immaterial, is not an admission of its truth.⁷ So, it is held that nothing is admitted by an omission to answer it except what is well pleaded.⁸ But a fact impliedly averred, if not denied, will be deemed admitted.⁹

1 See N. C. Code Civ. Proc. § 127; Cal. Code Civ. Proc. § 462; N. Y. Code Civ. Proc. § 522; Wall v. Livezey, 6 Colo. 465; Jenkins v. Ore Dressing Co. 65 N. C. 563; Sands v. St. John, 23 How. Pr. 140; 36 Barb. 628; Patterson v. Ely, 19 Cal. 28; Surget v. Byers, Hemp. 715; Sparrow v. Railroad Co. 7 Ind. 309; Reed v. Arnold, 10 Kan. 111; Steele v. Russell, 5 Neb. 215; Snell v. Crowe, 3 Utah, 28; Dole v. Burleigh, 1 Dakota, 227.

2 Colo. Code, § 76; Tucker v. Parks, Sup. Ct. Colo. 4 Colo. L. R. 306; Mayor etc. v. Cunliff, 2 N. Y. 165; Newman v. Otto, 4 Sand. 668.

3 Hartwell v. Page, 14 Wis. 49.

4 Hartwell v. Page, 14 Wis. 49; Dole v. Burleigh, 1 Dakota, 227.

5 Lillienthal v. Anderson, 1 Idaho, 673. So where an allegation in the complaint is denied by the answer, it is error to instruct the jury that it is admitted: Dyer v. McPhee, 6 Colo. 174.

6 Lillienthal v. Anderson, 1 Idaho, 673; Burke v. Water Company, 12 Cal. 407; Mulford v. Estrudillo, 32 Cal. 131; Wright v. Butler, 64 Mo. 165.

7 Connors v. Meir, 2 Smith, E. D. 314; Fry v. Bennett, 5 Sand. 54; Qechs v. Cook, 3 Duer, 161. So, an admission of a legal conclusion by the defendant in his answer is in no way binding upon the court: Cutting v. Lincoln, 9 Abb. Pr. N. S. 436. And see Union Bank v. Bush, 36 N. Y. 631; Downer v. Read, 17 Minn. 493.

8 Harlow v. Hamilton, 6 How. Pr. 475. And see Fry v. Bennett, 5 Sand. 54; Clay County v. Simonsen, 1 Dakota, 403; 2 Dakota, 112. Neither admissions nor stipulations can make a case broader than it is by allegation: Tucker v. Parks, Colo. Sup. Ct. 4 Colo. L. R. 311. And see Hicks v. Murray, 43 Cal. 522.

9 Anable v. Steam Engine Co. 16 Abb. Pr. 236; 25 N. Y. 470.

§ 65. What may be shown under general denial. — Generally speaking, a party may give in evidence under a general denial anything that tends to directly disprove the allegations of the complaint or petition,¹ or which goes to show that the cause of action sued upon never existed.² He may introduce evidence to disprove, wholly or in part, any fact which the plaintiff must establish to show a cause of action;³ but he cannot, under

a general denial, introduce evidence tending to show a defense founded upon new matter.⁴

1 *Caldwell v. Bruggerman*, 4 Minn. 270; *Evans v. Williams*, 60 Barb. 346. And see *Jacobs v. Remsen*, 35 Barb. 384; 38 N. Y. 668; *Brevoort v. Brevoort*, 8 Jones & S. 211; *Schoenrock v. Farley*, 17 Jones & S. 302; *Gates v. Preston*, 41 N. Y. 113; *Miller v. Insurance Co.* 1 Abb. N. C. 470; *Schulenberg v. Harriman*, 21 Wall. 59; *Woolley v. Newcombe*, 58 How. Pr. 480; 87 N. Y. 606; *Raynor v. Timerson*, 46 Barb. 518.

2 *Greenfield v. Mut. Life Ins. Co.* 47 N. Y. 430; *Evans v. Williams*, 60 Barb. 346. And see *McKyring v. Bull*, 16 N. Y. 297.

3 *O'Brien v. McCann*, 58 N. Y. 373, 376; *Bridges v. Paige*, 13 Cal. 640.

4 *Weaver v. Barden*, 49 N. Y. 236; *Boswell v. Welshoefer*, 9 N. Y. Week. Dig. 500; 9 Reporter, 630; *Glover v. Cliff*, 10 Cal. 303; *Terry v. Sickles*, 13 Cal. 430; *Walters v. Wash. Ins. Co.* 1 Iowa, 409; *School Dist. v. Shoemaker*, 5 Neb. 36.

2 66. Pleading new matter in defense.—New matter is that which admits and avoids the cause of action set up in the complaint or petition, and constitutes a defense thereto.¹ Whatever admits that a cause of action, as stated, once existed, but at the same time avoids it, that is, shows that it has ceased to exist, is new matter.² Such are release,³ accord and satisfaction,⁴ payment,⁵ leave and license,⁶ discharge in bankruptcy,⁷ act of God,⁸ and all defenses invalidating a contract which forms the subject of the action, such as fraud, duress, incapacity to contract, usury, and the like.⁹ So, all defenses based upon the asserted illegality of the contract in suit, which admit the fact of the transaction between the parties purporting to be an agreement, and apparently binding, but which insist that, by reason of some violation of the law, the same is illegal and void, are new matter.¹⁰ But an answer which merely denies the essential allegations of a complaint or petition, or states circumstances which, if testified to by credible witnesses, would disprove them, is not one containing new matter.¹¹ New matter as a defense must be distinctly set up in the answer;¹² and a defendant cannot give evidence of any defense of new matter not set up in his answer.¹³

even though such defense may appear from evidence offered by the plaintiff.¹⁴ But matters of defense accruing after suit brought and before answer is put in may be set up in the answer.¹⁵

1 Carter v. Koezley, 9 Bosw. 583; 14 Abb. Pr. 147; Gilbert v. Cram, 12 How. Pr. 455; Bellinger v. Craig, 31 Barb. 534; Goddard v. Fulton, 21 Cal. 430; State v. Williams, 48 Mo. 210; Northrup v. Insurance Co., 47 Mo. 435; Anson v. Dwight, 18 Iowa, 241; Horton v. Ruhling, 3 Nev. 498.

2 Coles v. Soulsby, 21 Cal. 47. A party does not waive the effect of a denial contained in one portion of his answer by setting up, in the appropriate manner, new or affirmative matter; Billings v. Drew, 52 Cal. 565; Buhne v. Corbett, 43 Cal. 364; Quigley v. Merritt, 11 Iowa, 147.

3 McKyring v. Bull, 16 N. Y. 297; Turner v. Caruthers, 17 Cal. 431.

4 Coles v. Soulsby, 21 Cal. 47; Piercy v. Sabin, 10 Cal. 30; Sweet v. Burdett, 40 Cal. 97.

5 Green v. Palmer, 15 Cal. 417; Seward v. Torrence, 3 Hun, 220.

6 Beaty v. Swarthout, 32 Barb. 293; Clifford v. Dam, 81 N. Y. 52.

7 Cornell v. Dakin, 28 N. Y. 253. And see Cromwell v. Burr, 59 How. Pr. 93; Philippe v. James, 1 Abb. Pr. N. S. 311; 3 Robt. 720.

8 New Haven etc. Co. v. Quintard, 37 How. Pr. 29; 6 Abb. Pr. N. S. 128.

9 Baker v. Bailey, 16 Barb. 54; Whitman v. Lake, 32 Wis. 199; People v. San Francisco, 27 Cal. 656; Maule v. Crawford, 14 Hun, 193; California etc. Co. v. Wright, 8 Cal. 585; Dillaye v. Parks, 31 Barb. 132; Wright v. Wright, 54 N. Y. 437; Smith v. Dunning, 61 N. Y. 249.

10 Boswell v. Welshoefer, 9 N. Y. Week. Dig. 500; 9 Reporter, 630.

11 Rodde v. Ruckgaber, 3 Duer, 648. And see Haight v. Child, 34 Barb. 186; Manning v. Winter, 7 Hun, 482; Goddard v. Fulton, 21 Cal. 430. A single paragraph of an answer cannot deny the cause of action, and confess and avoid it: Woollen v. Whitacre, 73 Ind. 198.

12 Glazer v. Clift, 10 Cal. 303; Tilson v. Clark, 45 Barb. 178; Morrell v. Insurance Co. 33 N. Y. 429; Catlin v. Gunther, 1 Duer, 253; McKyring v. Bull, 16 N. Y. 297; Johnson v. Ball, 74 N. C. 355; Railroad Co. v. Washburn, 5 Neb. 125; Ocean Steamship Co. v. Williams, 69 Ga. 251; Peet v. O'Brien, 5 Neb. 389.

13 Sanford v. Travers, 7 Bosw. 498; 40 N. Y. 140; Dieffendorf v. Gage, 7 Barb. 18; Baker v. Bailey, 16 Barb. 54. See Berdell v. Blissell, 6 Colo. 162.

14 Dingeldein v. Railroad Co. 9 Bosw. 79; Paige v. Willett, 38 N. Y. 23.

15 Willis v. Chipp, 9 How. Pr. 568; Reimer v. Doerge, 61 How. Pr. 142; Lansing v. Ensign, 62 How. Pr. 363. See Jessup v. King, 4 Cal. 331; Whitsett v. Clayton, 5 Colo. 476.

§ 67. Particular defenses — How interposed. — An accord and satisfaction must be specially pleaded.¹ So, the defense of total or partial payment is new matter in con-

fession and avoidance, and must be specially pleaded ;² but where the plaintiff alleges the indebtedness generally, without showing how it was created, the defendant is entitled to prove payment under a general denial ;³ and where the plaintiff sues for a balance due, for which judgment is claimed, the defendant may give other payments in evidence under a general denial.⁴ The defense of *another action pending* for the same cause should be set up by answer,⁵ and the answer must allege that the first action was pending when the second one was commenced,⁶ and is still pending at the time the answer is interposed.⁷ A defense that the plaintiff is an *alien enemy* is not available, unless it be pleaded specially and with certainty.⁸ So, an *award* is in confession and avoidance, and must be specially pleaded ;⁹ and the substance of the award must be sufficiently set forth to enable the court to say that if it was made the action is barred.¹⁰ The defense of *bankruptcy* must be specially pleaded ;¹¹ but a simple averment of discharge, setting forth a copy, is sufficient ;¹² the facts showing jurisdiction to grant the discharge need not be averred.¹³ A defense that the suit was commenced *before the cause of action accrued* should be set up by answer.¹⁴ The *record of a judgment* in a former suit between the same parties, for the same cause, is not admissible as a bar or estoppel, unless it be specially pleaded ;¹⁵ and a complete record of all the pleadings and proceedings in the case in which the former judgment was rendered should be made part of the answer.¹⁶ But when the issues have been adjudicated in a former action, the former judgment is proper as evidence of the facts established thereby, though not pleaded.¹⁷ *Coverture* must be pleaded to be available, if intended to be set up as a defense.¹⁸ So, of the defense of *infancy*.¹⁹ A *misnomer* of plaintiff or defendant must be pleaded ;²⁰

so, a defense that the plaintiff is not the *real party in interest* must be sustained by facts pleaded;²¹ so, the defense of disability of the plaintiff to bring a suit in the *form adopted* must be strictly pleaded.²² *Fraud* must be specially pleaded, and cannot be sustained as a defense under a general denial;²³ and the circumstances constituting the fraud must in general be set up.²⁴ So, the defense of *usury* must be specially pleaded in order to be availed of;²⁵ and in interposing the defense of usury, it must be pleaded with such precision and certainty as to make out, on the face of the pleading, that a corrupt and usurious contract has been entered into.²⁶ The defense must aver clearly every particular necessary to establish the usury charged, and must negative every supposable fact which, if true, would render the transaction innocent.²⁷ And the particular facts relied upon to establish the defense must be proved substantially as alleged.²⁸ In alleging usury under the laws of another State, the defendant must allege what those laws were, and the facts which rendered the transaction usurious under them.²⁹ An answer setting up *duress* or *coercion* as a defense should aver the facts constituting it.³⁰ So, the facts constituting an *estoppel* must be pleaded; if a party seeks to avail himself of the benefits of them as a defense.³¹ But in an action for conversion, facts constituting an estoppel were held to be admissible in evidence on the question of title without being specially pleaded.³²

1 *Piercy v. Sabin*, 10 Cal. 30; *Berdell v. Bissell*, 6 Colo. 162. See *Jackson v. Olmstead*, 87 Ind. 92; *Frick v. Algeier*, 87 Ind. 255.

2 *McKyring v. Bull*, 16 N. Y. 297; *Knapp v. Runals*, 37 Wis. 133; *Shipman v. State*, 43 Wis. 381; *Irwin v. Faulett*, 1 Kan. 418; *Clark v. Spencer*, 14 Kan. 388; *Mohr v. Barnes*, 4 Colo. 350; *Fewster v. Goddard*, 25 Ohio St. 278.

3 *Parker v. Hays*, 7 Kan. 412. And see *Knapp v. Roche*, 94 N. Y. 329; *Seymour v. Shea*, 62 Iowa, 708.

4 *McElwee v. Hutchinson*, 10 S. C. 436; *Quin v. Lloyd*, 41 N. Y. 349; *White v. Smith*, 46 N. Y. 418. In California, in an action to

recover money due, the defendant may prove payment under a general denial in the answer: *Wetmore v. San Francisco*, 44 Cal. 294; *Davanay v. Eggenhoff*, 43 Cal. 395. If a creditor, holding a claim as collateral security, collects it and applies the proceeds to his own use, it is a payment *pro tanto*, and the fact may be shown under an answer alleging payment: *Farnsley v. Anderson Machine Works*, 90 Ind. 120.

5 *Williams v. McGrade*, 18 Minn. 82; *White v. Talmage*, 3 Jones & S. 223; *Turner v. Reese*, 22 Kan. 319; *Wythe v. City of Salem*, 4 Sawy. 88; *Calaveras Co. v. Brockway*, 80 Cal. 325; *Dawley v. Brown*, 79 N. Y. 390; *Ward v. Dewey*, 12 How. Pr. 193; *Bourland v. Nixon*, 27 Ark. 315.

6 *Hadden v. St. Louis etc. R. R. Co.* 57 How. Pr. 390; *Porter v. Kingsbury*, 77 N. Y. 164.

7 *Hopwood v. Patterson*, 2 Oreg. 49.

8 *Burnside v. Matthews*, 54 N. Y. 73. And see *Sanderson v. Morgan*, 25 How. Pr. 144; 30 N. Y. 231.

9 *Brown v. Perry*, 14 Ind. 32; *Brazill v. Isham*, 1 Smith, E. D. 437; 12 N. Y. 9. Compare *N. Y. Cent. Ins. Co. v. Nat. Protection Ins.-Co.* 14 N. Y. 85.

10 *Lobdell v. Stowell*, 37 How. Pr. 83; 51 N. Y. 70.

11 *Cornell v. Dakin*, 38 N. Y. 253; *Fellows v. Hall*, 3 McLean, 281; *Ludeling v. Felton*, 29 La. An. 719.

12 *Hays v. Ford*, 55 Ind. 82; *Cromwell v. Burr*, 59 How. Pr. 63; *Lathrop v. Stuart*, 5 McLean, 167.

13 *Cromwell v. Burr*, 59 How. Pr. 63. And see *Hennequin v. Clews*, 84 N. Y. 676. But compare *Hayes v. Flowers*, 25 Miss. 161.

14 *Smith v. Holmes*, 19 N. Y. 271. See *Mack v. Burt*, 5 Hun, 28.

15 *Richardson v. Hickman*, 22 Ind. 244; *Cave v. Crafts*, 53 Cal. 135; *Marshall v. Shafter*, 32 Cal. 176; *McKnight v. Taylor*, 1 Mo. 282; *Fanning v. Hibernia Ins. Co.* 37 Ohio St. 344; *Dalrymple v. Hunt*, 5 Hun, 111; *Henderson v. Scott*, 19 N. Y. Week. Dig. 255. And see *Perry v. Dickerson*, 85 N. Y. 345; *Dawley v. Brown*, 79 N. Y. 360. A former adjudication in favor of several defendants is a good defense to a subsequent action upon the same cause against any of such defendants: *State v. Krug*, 84 Ind. 366.

16 *Williamson v. Foreman*, 23 Ind. 540; *Ringle v. Weston*, 23 Ind. 583. And see *Secor v. Sturges*, 2 Abb. Pr. 69; 16 N. Y. 548; *Goddard v. Benson*, 15 Abb. Pr. 191; *Rice v. Harbeson*, 63 N. Y. 493; *Heatherly v. Hadley*, 2 Oreg. 269; *Rynearson v. Parkhurst*, 88 Ind. 264.

17 *Earl v. Bowen*, 3 N. Y. Week. Dig. 461; *Krekeler v. Ritter*, 62 N. Y. 372.

18 *Stevens v. Bostwick*, 2 Hun, 423; *Dillaye v. Parks*, 31 Barb. 132; *Frecking v. Rolland*, 63 N. Y. 422; *Ferris v. Holmes*, 8 Daly, 217; *Smith v. Dunning*, 61 N. Y. 249; *Caldwell v. Brown*, 43 Tex. 216. See *Kitty v. Long*, 1 Hun, 714.

19 See *Young v. Bell*, 2 Cranch C. C. 342; *Mott v. Burnett*, 2 Smith, E. D. 50; *Roe v. Angevine*, 7 Hun, 679; *Miller v. Fisher*, Ariz. 232; *Pinchback v. Graves*, 42 Ark. 222; *Rush v. Wick*, 31 Ohio St. 512.

20 *King v. Randlett*, 33 Cal. 321; *Thompson v. Elliott*, 5 Mo. 118; *White v. Miller*, 7 Hun, 427; *Traver v. Eighth Av. R. R. Co.* 6 Abb. Pr. N. S. 46; 4 Abb. Ct. App. 422. See *State v. Telephone Co.* 36 Ohio St. 296.

21 *White v. Drake*, 3 Abb. N. C. 133; *Horton v. Shepherd*, 1 Civ. Proc. R. 26; *Hammond v. Earle*, 58 How. Pr. 423. Compare *Swift v. Swift*, 46 Cal. 268.

22 *Wright v. Wright*, 54 N. Y. 437.

23 *Gifford v. Carville*, 29 Cal. 589; *Lefler v. Field*, 52 N. Y. 621; *Tucker v. Parks*, Sup. Ct. Colo. 4 Colo. L. R. 306.

24 *First Nat. Bank v. How*, 1 Mont. 604; *Shook v. Singer Manuf. Co.* 61 Ind. 520; *McComas v. Haas*, 93 Ind. 230; *Lamott v. Butler*, 18 Cal. 32; *People v. Supervisors*, 27 Cal. 656; *McMurray v. Gifford*, 5 How. Pr. 14; *Wilder v. De Cou*, 18 Minn. 470; *Clark v. Scott*, 5 Fish. Pat. Cas. 245; *Hilsen v. Libby*, 12 Jones & S. 12; *Simmons v. Kayser*, 11 Jones & S. 131. See *Culver v. Hollister*, 29 How. Pr. 479; 17 Abb. Pr. 406; *Green v. Hallenbeck*, 24 Hun, 116.

25 *Morford v. Davis*, 28 N. Y. 481; *West Transp. Co. v. Kelderhouse*, 87 N. Y. 430; *Cone v. Warner*, 18 N. Y. Week. Dig. 90; *Butterworth v. Pecare*, 8 Bosw. 671. The plea of usury is one regulated by special legislation in Georgia: See *Trammell v. Woolfolk*, 63 Ga. 628; *McElroy v. City Council*, 65 Ga. 387.

26 *Nat. Bank v. Lewis*, 75 N. Y. 519; 10 Hun, 468. And see *Griggs v. Howe*, 31 How. Pr. 630; 31 Barb. 100; *Maule v. Crawford*, 14 Hun, 193; *Burrall v. Bowen*, 21 How. Pr. 378; *Nat. Bank v. Orcutt*, 45 Barb. 256; *Newman v. Kershaw*, 10 Wis. 333.

27 *Banks v. Van Antwerp*, 15 How. Pr. 29; 5 Abb. Pr. 411; *Gaston v. McLeran*, 3 Oreg. 389; *Manning v. Tyler*, 21 N. Y. 567.

28 *West. Transp. Co. v. Kelderhouse*, 87 N. Y. 430.

29 *Cutler v. Wright*, 22 N. Y. 472; *Mayer v. Louis*, 12 Abb. Pr. N. S. 5; *Curtis v. Masten*, 11 Paige, 15.

30 *Conn. Life Ins. Co. v. McCormick*, 45 Cal. 580; *Richardson v. Hittle*, 31 Ind. 119. See *McClintic v. Johnson*, 1 McLean, 414; *Line v. Blizard*, 70 Ind. 23; *First Nat. Bank v. Bryan*, 62 Iowa, 42; *McVane v. Williams*, 50 Conn. 548.

31 *Leland v. Isenbeck*, 1 Idaho, 460; *Rugh v. Ottenheimer*, 6 Oreg. 231; *Anderson v. Hubble*, 93 Ind. 570; 47 Am. Rep. 304; *Hanson v. Chiatovich*, 13 Nev. 395; *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Burlington etc. R. R. Co. v. Harris*, 8 Neb. 140; *Warder v. Baldwin*, 51 Wis. 450. And the answer must show that the plaintiff had knowledge of the facts constituting the estoppel: *Buck v. Milford*, 90 Ind. 291.

32 *Rogers v. King*, 66 Barb. 495.

§ 68. *Statute of frauds.* — Generally speaking, the statute of frauds may be relied upon as a defense as well under a general denial as under any other answer.¹ But when the complaint or petition sets forth a contract, and the answer admits the allegation, the defendant must specially plead the statute, or it will furnish no defense.² And when it is pleaded, the facts relied upon in defense under the statute should be set out.³ It has been held that if it be fairly inferable from the

petition that the agreement sued on is within the statute of frauds, that defense can be availed of on demurrer.⁴

1 *Birchell v. Neaster*, 36 Ohio St. 331; *Amburger v. Marvin*, 4 Smith, E. D. 393; *Blanck v. Little*, 10 Reporter, 151; *Wiswell v. Tefft*, 5 Kan. 263; *Morrison v. Baker*, 81 N. C. 76; *Bonham v. Craig*, 80 N. C. 224. Where a defense is founded on an agreement which is within the statute of frauds, the answer must show that such agreement was in writing: *Reinheimer v. Carter*, 31 Ohio St. 579. But see *Tucker v. Edwards*, Sup. Ct. Colo. 3 Pacif. L. Rep. 233.

2 *Duffy v. O'Donovan*, 46 N. Y. 226; *Marston v. Swett*, 66 N. Y. 206; *Alger v. Johnson*, 4 Hun, 412; *Haught v. Child*, 34 Barb. 186; *Burt v. Wilson*, 23 Cal. 632; *Gwynn v. McCauley*, 32 Ark. 97. See *Maynard v. Johnson*, 2 Nev. 16; *Osborne v. Endicott*, 6 Cal. 149.

3 *Dinkel v. Gundelfinger*, 35 Mo. 172; *Bean v. Valle*, 2 Mo. 128. If not pleaded in the court below it cannot be considered upon appeal: *Kraft v. Greathouse*, 1 Idaho, 254.

4 *Howard v. Brower*, 37 Ohio St. 402. And see *Chapin v. Longworth*, 31 Ohio St. 424; *Wentworth v. Wentworth*, 2 Minn. 277.

§ 69. *Statute of Limitations.*—The Statute of Limitations, to be made available as a defense, must be directly pleaded.¹ The defense of the statute cannot be shown under a general denial,² and is not available on demurrer unless it affirmatively appears upon the face of the complaint or petition that the cause of action is barred by the lapse of the prescribed time,³ and, in some States, that the case is not within any exception to the statute.⁴ And in some of the States, the objection can be taken by answer only, and demurrer does not lie even if the defect appears upon the face of the complaint.⁵ The answer should allege that the cause of action did not accrue within the prescribed period before the commencement of the action;⁶ and alleging that the defendant did not, at any time within the prescribed period, undertake, promise, or agree, is bad as an answer of the statute.⁷ A plea of the statute must refer to the commencement of the proceedings supposed to be barred by lapse of time;⁸ to the time of filing the original and not an amended complaint.⁹ One who claims the benefit of a particular Statute of

Limitations, which applies only to a particular class of cases, must plead it specially, and a plea of the general statute is not sufficient.¹⁰ But no one has a right to encumber the record with a statement of the reasons which induce him to plead the Statute of Limitations, and such redundant matter will be stricken out on motion.¹¹ A plea of the Statute of Limitations of another State or country is no defense;¹² the *lex fori* governs all questions arising under that statute.¹³ In an action to recover the possession of real property, the defense of adverse possession cannot be shown under the general denial, and must be pleaded.¹⁴ But it is held, that when the title to property is put in issue by the pleadings in a case, by allegations and denials of title, a question of adverse possession may be raised without being specially pleaded.¹⁵

1 Budd v. Walker, 23 Hun, 344; A. & N. R. R. Co. v. Miller, 81 Minn. 661; Steamer Senorita v. Simonds, 1 Oreg. 274; Smith v. Richmond, 19 Cal. 476; Kahnweiler v. Anderson, 78 N. C. 133; Green v. Railroad Co. 78 N. C. 524; Parker v. Irwin, 47 Ga. 405. That the statute must be taken advantage of in the court below: See Kraft v. Greathouse, 1 Idaho, 254; People v. Broadway Wharf Co. 81 Cal. 33; Vassault v. Oats, 81 Ind. 225.

2 Orton v. Noonan, 25 Ind. 672; Vore v. Woodford, 29 Ohio St. 245; Towsley v. Moore, 30 Ohio St. 184; Walker v. Flint, 3 McCrary, 507.

3 Hudson v. Wheeler, 24 Tex. 356; Springer v. Clay County, 35 Iowa, 241; Harmon v. Page, 62 Cal. 448; Farris v. Merritt, 63 Cal. 113; Brennan v. Ford, 46 Cal. 7; Moulton v. Walsh, 30 Iowa, 361; Hurley v. Cox, 9 Neb. 230; Huston v. Craighead, 23 Ohio St. 198; Young v. Whittenhall, 15 Kan. 579; Buckingham v. Orr, Sup. Ct. Colo. 4 Colo. L. R. 88; Henoch v. Chaney, 61 Mo. 127; State v. Spencer, 79 Mo. 314; Hexter v. Clifford, 5 Colo. 168; Bass v. Berry, 51 Cal. 264; Davenport v. Short, 17 Minn. 24; Burnes v. Crane, 1 Utah, 179; Combs v. Watson, 32 Ohio St. 22. Is by statute available to an administrator or executor without being specially pleaded in Indiana: Zeller v. Griffith, 89 Ind. 80; Perrill v. Nichols, 89 Ind. 444.

4 Devor v. Berlek, 87 Ind. 337; Milner v. Hyland, 77 Ind. 458; Collins v. Mack, 81 Ark. 684; Rankin v. Turney, 2 Bush, 555; Lucas v. Labertue, 88 Ind. 277; State v. Younts, 89 Ind. 313; Hogan v. Robinson, 94 Ind. 138; Biggs v. McCarty, 86 Ind. 352; 44 Am. Rep. 320; Epperson v. Hostetter, 95 Ind. 583.

5 Dezengremel v. Dezengremel, 24 Hun, 457; Vorhies v. Vorhies, 24 Barb. 150; Baldwin v. Martin, 14 Abb. Pr. N. S. 9; Kahnweiler v. Anderson, 78 N. C. 133.

6 McCollister v. Willey, 53 Ind. 382. And see Sharpe v. Freeman, 2 Lana. 171; 45 N. Y. 302; Paine v. Comstock, 57 Wis. 156; Bell v.

Yates, 33 Barb. 627; Orton v. Noonan, 25 Wis. 672; Caulfield v. Sanders, 17 Cal. 569; Zellin v. Rogers, Cir. Ct. Oreg. 3 West C. Rep. 466.

7 McCollister v. Willey, 52 Ind. 382. And see *Paine v. Comstock*, 57 Wis. 159.

8 *Lincoln v. Thompson*, 75 Mo. 613.

9 *Lorenzana v. Camarillo*, 45 Cal. 125.

10 *Howell v. Rogers*, 47 Cal. 291. Compare *Hiles v. La Flesh*, 59 Wis. 765; *Haseltine v. Simpson*, 58 Wis. 579. The statute is sufficiently pleaded by a reference in the answer to the appropriate sections of the Code: *Packard v. Johnson*, Sup. Ct. Cal. 3 West C. Rep. 763.

11 *Nichols v. Briggs*, 18 S. C. 473.

12 *Miller v. Brenham*, 68 N. Y. 83. But the rule is otherwise by statute in some of the States: See *Whelan v. Kinsley*, 26 Ohio St. 131; *Hoyt v. McNeill*, 13 Minn. 390; *Gillet v. Hill*, 32 Iowa, 220.

13 *Miller v. Brenham*, 68 N. Y. 83; *Power v. Hathaway*, 43 Barb. 214; *Scudder v. Nat. Bank*, 91 U. S. 406.

14 *Hansee v. Mead*, 2 Civ. Proc. R. 175. And see *Ford v. Sampson*, 30 Barb. 183; 8 Abb. Pr. 323; *McManus v. O'Sullivan*, 48 Cal. 15; *Winslow v. Winslow*, 52 Ind. 8.

15 *Donahue v. Thompson*, Sup. Ct. Wis. 19 N. W. Rep. 520. See *Zellin v. Rogers*, Cir. Ct. Oreg. 3 West C. Rep. 466.

§ 70. Pleading statutes, generally.—As a general rule, private statutes must be pleaded; but in pleading a private statute, it is sufficient to designate the statute by its chapter, year of passage, and title, or in some other manner with convenient certainty.¹ It is, however, the safest course, when pleading a statute sanctioning a defense, to follow the words of the statute.² And where a statute is pleaded to defeat a common-law right, the facts rendering the statute applicable must be distinctly alleged and proved, and not be left to mere inference.³ Where it becomes necessary to plead a city ordinance, it must be set forth in the pleading as any other fact of which the courts take no judicial notice.⁴ So, the statutes of a foreign state must be averred in the same manner as other facts not judicially noticed by the courts.⁵ But public domestic statutes need not be set out or even referred to in a pleading, since the courts will take judicial notice of their existence and terms.⁶ And if a private and local act contains some provisions neither private nor local, these when relied on need not be pleaded.⁷

1 See *N. Y. Code Civ. Proc.* § 530; *Pittsburgh etc. Railroad Co. v. Moore*, 33 Ohio St. 384; *Atchison etc. R. R. Co. v. Blackshire*, 10 Kan. 477.

2 *Cole v. Jessup*, 10 N. Y. 96; 10 How. Pr. 515; *Ford v. Babcock*, 2 Sand. 518. And see *Territory v. Reyburn*, McCahon, 134.

3 *Miller v. Rossler*, 4 Smith, E. D. 234. And see *O'Toole v. Garvin*, 1 Hun, 82.

4 *Pomeroy v. Lappens*, 9 Oreg. 363. And see *Garvin v. Wells*, 8 Iowa, 236; *Winona v. Burke*, 23 Minn. 254; *City of Los Angeles v. Waldron*, Sup. Ct. Cal. 3 Pacif. L. R. 890.

5 *Wheelan v. Kinsley*, 26 Ohio St. 131; *Williams v. Finlay*, 40 Ohio St. 342; *Milligan v. State*, 86 Ind. 553; *Throop v. Hatch*, 3 Abb. Pr. 23; *Roots v. Merriwether*, 8 Bush, 397; *Hoyt v. McNell*, 13 Minn. 390; *Bethell v. Bethell*, 82 Ind. 318.

6 *Bogardus v. Trinity Church*, 4 Paige, 178; 15 Wend. 111; *Goelet v. Cowdrey*, 1 Duer, 132.

7 *Bretz v. Mayor etc.*, 35 How. Pr. 130; 4 Abb. Pr. N. S. 243; 6 Robt. 323. And see *Webb v. Bidwell*, 15 Minn. 470.

§ 71. *Consideration.*—In all cases where the instrument sued on imports a consideration, and none is therefore alleged in the complaint or petition, a want of consideration cannot be proved under a general denial, but must be specially averred in the answer in order to be availed of as a defense.¹ But in actions upon contracts which do not import a consideration, and where the plaintiff must aver one as part of his case, a want of consideration may be sustained under a general denial.² A failure of consideration, which must always occur subsequent to the making of the contract, stands, however, upon a different footing, and to be good as a defense must be pleaded specifically.³ This is upon the principle, that if a cause of action has once accrued, or existed, and has been satisfied or defeated by reason of something which has occurred subsequently, that is new matter, which must be pleaded in order to render it competent as evidence.⁴ Want of consideration may be pleaded to a part as well as the whole of a cause of action, when limited to that part;⁵ and in an action on a promissory note, a plea that, as to all in excess of a certain part of the note, it "was given without any consideration therefor," is sufficient.⁶ So, in an action on

a note, the defendant may plead both a denial of the execution of the note, and a want of consideration ;⁷ or he may deny the execution, and allege that the signature, if genuine, was obtained by fraud, and that there was no valid consideration for the note.⁸ If the defendant alleges a want of consideration, and in a second defense sets forth the circumstances under which the note was given, the first branch of the answer will be interpreted by the second ;⁹ and if it appears from the circumstances that there was a consideration, the first defense, although direct and positive, will not avail.¹⁰ As a general rule, illegality of consideration cannot be given in evidence under a general denial, but must be specially pleaded.¹¹ An illegal consideration is, in effect, no consideration.¹²

1 Bingham v. Kimball, 17 Ind. 336; Philbrooks v. McEwen, 20 Ind. 347; Nelson v. White, 61 Ind. 139; Smith v. Flack, 95 Ind. 116; Alden v. Carpenter, Sup. Ct. Colo. 4 Colo. L. R. 430; Patterson v. Gile, 1 Colo. 200; Hammond v. Earle, 58 How. Pr. 423.

2 Evans v. Williams, 80 Barb. 346.

3 Moore v. Boyd, 95 Ind. 134, 135; Dubois v. Hermance, 56 N. Y. 673. Compare Spies v. Roberts, 18 Jones & S. 301.

4 Evans v. Williams, 60 Barb. 346. And see Alden v. Carpenter, Sup. Ct. Colo. 4 Colo. L. R. 430.

5 Webster v. Parker, 7 Ind. 185; Manly v. Hubbard, 9 Ind. 220; Moore v. Boyd, 95 Ind. 134. See Holzworth v. Koch, 26 Ohio St. 33; Wallace v. Boston, 10 Mo. 660; Clough v. Murray, 19 Abb. Pr. 97.

6 Moore v. Boyd, 95 Ind. 134.

7 Pavey v. Pavey, 30 Ohio St. 600.

8 Citizens' Bank v. Closson, 29 Ohio St. 78.

9 Foren v. Dealey, 4 Oreg. 92.

10 Foren v. Dealey, 4 Oreg. 92.

11 Stannard v. McCarty, 1 Morris, 124; A. & N. R. R. Co. v. Miller, 31 Minn. 661; Chambers v. Games, 2 Iowa, 320; Mechanics' Bank v. Williams, 44 Barb. 87; Mathews v. Leaman, 24 Ohio St. 615; Haigh v. Kaye, Law R. 7 Ch. App. 463. And see Stafford Pavement Co. v. Monheimer, 9 Jones & S. 184; Boswell v. Weishoefer, 9 Daly, 106; 9 N. Y. Week. Dig. 500; 9 Reporter, 630. But compare Pease v. Walsh, 7 Jones & S. 514; Russell v. Burton, 66 Barb. 539; Frost v. Moore, 40 Cal. 347. If it is sought to prove the illegality of consideration for a negotiable instrument or other contract sued upon, and such illegality does not necessarily appear from the evidence offered by the plaintiff to prove his contract, it can only be done under an answer specially pleading the illegality: May v. Burras, 13 Abb. N. C. 384.

12 Wilkins v. Riley, 47 Miss 306.

§ 72. **Justification.**—In an action for a tort, a defense of justification is in confession and avoidance, and must be specially pleaded if relied on.¹ The facts relied on, and proposed to be offered in evidence in justification, must be specially pleaded, and cannot be permitted to go in evidence under a general denial.² So, the particulars must be alleged;³ thus, in an action for slander, an answer which merely avers as a defense that all the statements made by the defendant respecting the plaintiff are true is bad.⁴ But a defendant may, in such action, unite a general denial with a justification in his answer, the two defenses not being inconsistent in a legal sense.⁵

1 *Kerwich v. Steelman*, 44 Ga. 199; *Ocean Steamship Co. v. Williams*, 69 Ga. 251; *Boaz v. Tate*, 43 Ind. 60; *Konigsberger v. Harvey*, Sup. Ct. Oreg. 7 Pacif. L. Rep. 114.

2 *Duval v. Davey*, 32 Ohio St. 604.

3 *Billings v. Waller*, 29 How. Pr. 97; *Wachter v. Quenzer*, 26 N.Y. 547; *Sunman v. Brewin*, 53 Ind. 140; *Tilson v. Clark*, 45 Barb. 173.

4 *Robinson v. Hatch*, 55 How. Pr. 55.

5 *Weston v. Lumley*, 33 Ind. 486; *Harper v. Harper*, 10 Bush, 447; *Murphy v. Carter*, 1 Utah, 17; *Cole v. Woodson*, 32 Kan. 272.

§ 73. **Leave and license.**—A defense of leave and license must be specially pleaded.¹ Thus, license to enter on the premises of another must be specially pleaded, and cannot be shown under a general denial.² So, in an action for an unlawful taking and conversion of property, evidence offered to justify the taking by showing a license is not admissible under a general denial.³ But the defendant in an action of trespass may, in his answer, deny the plaintiff's title, and also plead a license to do the act complained of, the latter plea not being an admission of the plaintiff's title.⁴ In California, where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing, *first*, that the land is public land; *second*, that it contains mines

or minerals; *third*, that he enters for the *bona fide* purpose of mining; and such justification must be affirmatively pleaded in the answer, with all the requisite averments to show a right under the statute or by-law to enter.⁵

1 Haight v. Badgeley, 15 Barb. 499; Clifford v. Dam, 81 N. Y. 52. This was required under the former system of pleading, and the same or greater reason exists for its continuance under the Code system: Clifford v. Dam, 12 Jones & S. 391; 81 N. Y. 52.

2 Haight v. Badgeley, 15 Barb. 499; Hetfield v. Central R. R. Co. 29 N. J. L. 571. See Sherman v. Buick, 32 Cal. 241.

3 Beaty v. Swarthout, 32 Barb. 293. And see Glazier v. Clift, 10 Cal. 303; McDonald v. Prescott, 2 Nev. 109. But see *contra*, Wallace v. Robb, 37 Iowa, 192.

4 Booth v. Sherwood, 12 Minn. 426. Compare Potter v. Smith, 70 N. C. 299.

5 Lentz v. Victor, 17 Cal. 271.

§ 74. **Negligence.**— Where one sues another for negligence, his own negligence contributing to the injury will constitute a defense to the action.¹ And it is held that, in such an action, facts tending to establish contributory negligence on the part of the plaintiff are admissible in evidence under a general denial, without being specially pleaded.² The rule in some States is, that if a plaintiff can prove his case without disclosing his own contributory negligence, such contributory negligence is matter of defense to be proved by the defendant;³ and where the burden of proving contributory negligence is upon a defendant, he may allege affirmatively in his pleading the fact of contributory negligence which he is required to prove;⁴ or proof of it is admissible under a general denial in the answer.⁵ In an action for an injury alleged in the complaint to have been caused by the negligence of the defendant's servants, a general denial puts in issue the defendant's liability, and evidence is admissible thereunder to show that the injury was caused by other persons, not the servants or agents of the defendant.⁶ Where one sues

another for a positive, willful wrong or fraud, negligence by which the party injured exposed himself to the wrong or fraud will not bar relief.⁷

1 *Bunn v. Railroad Co.* 6 Hun, 303; *Gray v. Railroad Co.* 65 N. Y. 561; *Murphy v. Deane*, 101 Mass. 455; 3 Am. Rep. 390; *Reese v. Railroad Co.* 67 Barb. 205.

2 *Railroad Co. v. Rutherford*, 29 Ind. 82; *Board of Commissioners v. Legg*, 93 Ind. 523; *McDonell v. Buffum*, 31 How. Pr. 151; *Jonesboro etc. Turnp. Co. v. Baldwin*, 57 Ind. 86; *Cunningham v. Lyness*, 22 Wis. 245. But proof of the intervention of *vis major*—the act of God—is not admissible unless specially pleaded: *New Haven v. Quintard*, 6 Abb. Pr. N. S. 128.

3 *Randall v. Telegraph Co.* 54 Wis. 47; *Hoth v. Peters*, 55 Wis. 406; *Railroad Co. v. Murphy*, 46 Tex. 366; *Gay v. Winter*, 34 Cal. 153; *Railroad Co. v. Crawford*, 24 Ohio St. 636; *Railroad Co. v. Hoehl*, 12 Bush, 41. And see *Railroad Co. v. Holst*, 93 U. S. 291. But that contributory negligence must be negatived by the plaintiff in the complaint or petition: See *Greenleaf v. Railroad Co.* 29 Iowa, 14; 4 Am. Rep. 181; *Doggett v. Railroad Co.* 78 N. C. 305; *Kahn v. Love*, 3 Oreg. 206; *Maxfield v. Railroad Co.* 41 Ind. 269; *Murphy v. Deane*, 101 Mass. 455; 3 Am. Rep. 390. See as to the rule in New York: *Johnson v. Railroad Co.* 6 Duer, 633; 18 N. Y. 65; *Morrison v. Railroad Co.* 4 Hun, 424; 63 N. Y. 643.

4 *Kelley v. Chicago etc. R. R. Co.* Sup. Ct. Wis. 19 N. W. Rep. 521.

5 *St. Anthony Falls etc. Co. v. Eastman*, 20 Minn. 307; *Hocum v. Witherick*, 22 Minn. 152. But see *contra*. *Railroad v. Washburn*, 5 Neb. 117.

6 *Schular v. Railroad Co.* 38 Barb. 653. The rule is, that under a general denial, the defendant is at all times at liberty to prove anything tending to show that the plaintiff's allegation is untrue: *Schaus v. Manhattan Gas Light Co.* 4 Jones & S. 267; 14 Abb. Pr. N. S. 371; *Greenfield v. Life Ins. Co.* 47 N. Y. 430; *Adams Express Co. v. Darnell*, 31 Ind. 20.

7 *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40, 49.

§ 75. **Denials of damages.**—It is very generally held, that allegations of value or amount of damages in a complaint or petition are not material, traversable allegations,¹ and are not admitted by a failure on the part of the defendant to deny them in his answer.² Thus, in an action for a breach of covenant, an averment in the complaint of the amount of damages is not issuable matter, and the defendant does not admit the amount alleged by neglecting to deny it.³ So, in an action for detaining personal property, the value is not the subject of an issue, and should not be denied.⁴ In some States it is expressly provided, that an allegation

of value or amount of damage shall not be deemed true by a failure to controvert it;⁵ but this does not apply to the amount claimed in actions on contracts for the recovery of money only.⁶ And even in cases of tort, amount of damages may be alleged so as to be material, and not being denied, will be deemed admitted.⁷ Under the Colorado Code, allegations of value and damages in replevin are material, and unless denied are admitted.⁸

1 *Moloney v. Dows*, 15 How. Pr. 261; 2 Hilt. 247; *Baldwin v. Navigation Co.* 4 Daly, 314; *Wood v. Steamboat Fleetwood*, 13 Mo. 529; *Field v. Barr*, 27 Mo. 416; *Gill v. Sells*, 15 Ohio St. 195.

2 *Field v. Barr*, 27 Mo. 416; *Loeb v. Kamak*, 1 Mont. 152.

3 *Hackett v. Richards*, 3 Smith, E. D. 13.

4 *Connors v. Meir*, 2 Smith, E. D. 314; *Jenkins v. Steanka*, 19 Wis. 126; *Chicago etc. R. R. Co. v. Packet Co.* 38 Iowa, 377; *Newman v. Otto*, 4 Sand. 668; *Woodruff v. Cook*, 25 Barb. 506; *Sopris v. Webster*, 1 Colo. 507.

5 See 2 Ohio Rev. Stats. § 5081; Iowa Code, § 2712; Kan. Code Civ. Proc. § 123.

6 Kan. Code Civ. Proc. § 123; *Dallas v. Furneau*, 25 Ohio St. 635.

7 *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279. And see *Booth v. Powers*, 56 N. Y. 22.

8 *Tucker v. Parks*, Sup. Ct. Colo. 4 Colo. L. Rep. 306; 7 Colo. 61. And see *Tully v. Harloe*, 35 Cal. 302.

‡ 76. **Matter in aggravation or mitigation.** — Aggravating circumstances are not traversable, and are not admitted by the failure of the defendant to deny them.¹ Generally speaking, circumstances in mitigation may be shown under a general denial, and need not be set up in the answer.² The defendant may prove, under a general denial, any facts which tend to diminish or reduce the actual damages which the plaintiff claims to have sustained.³ Thus, in an action to recover for the value of services, the defendant may show, under a general denial, a special agreement between the parties, fixing the compensation at a sum less than that claimed.⁴ So, in an action for breach of promise of marriage, any misconduct showing that the plaintiff

would be an unfit companion in married life may be given in evidence in mitigation under a general denial;⁵ as, for instance, that the plaintiff drank to excess.⁶ And evidence of an act of adultery by the plaintiff, more than twenty-five years previously, was held to be admissible in mitigation, although no such defense had been pleaded.⁷ In an action for an assault or false imprisonment, evidence in mitigation may be given by the defendant, although matter in mitigation be not pleaded.⁸ So in an action for seduction, matter in mitigation may be given in evidence without being pleaded.⁹ So in an action for a conversion of goods, evidence in mitigation may be introduced under a general denial.¹⁰ And in some States, even in actions for libel or slander, matter in mitigation may be proved without being averred.¹¹ But in other States, in an action for libel or slander, circumstances in mitigation must be set up in the answer in order to make evidence thereof admissible.¹²

1 Schnaderbeck v. Worth, 8 Abb. Pr. 37; Moloney v. Dows, 15 How. Pr. 261; Gilbert v. Rounds, 14 How. Pr. 46; Lane v. Gilbert, 9 How. Pr. 150.

2 Smith v. Lisher, 23 Ind. 500; Hays v. Berryman, 6 Bosw. 679; Duval v. Davey, 32 Ohio St. 604; Haywood v. Foster, 16 Ohio St. 83; O'Brien v. McCann, 58 N. Y. 373; Dunlap v. Snyder, 17 Barb. 561.

3 Wandell v. Edwards, 25 Hun, 498; Smith v. Lisher, 23 Ind. 500. But see Bradner v. Faulkner, 93 N. Y. 515; 13 N. Y. Week. Dig. 134.

4 Blizzard v. Applegate, 61 Ind. 363.

5 Button v. McCauley, 5 Abb. Pr. N. S. 29; 1 Abb. Ct. App. 232.

6 Button v. McCauley, 5 Abb. Pr. N. S. 29; 1 Abb. Ct. App. 232.

7 Tompkins v. Wadley, 3 Thomp. & C. 424.

8 Hays v. Berryman, 6 Bosw. 679. See Bradner v. Faulkner, 13 N. Y. Week. Dig. 134.

9 Travis v. Barger, 24 Barb. 614; Wandell v. Edwards, 25 Hun, 498.

10 Wehle v. Wehle, 43 How. Pr. 5; 12 Abb. Pr. N. S. 139. And see Schoenrock v. Farley, 17 Jones & S. 302.

11 See Duval v. Davey, 32 Ohio St. 604; B— v. I—, 22 Wis. 372; Wilson v. Noonan, 35 Wis. 321; Jarnigan v. Fleming, 43 Miss. 710; 5 Am. Rep. 514.

12 See Spooner v. Keeler, 51 N. Y. 527; Willover v. Hill, 72 N. Y. 36; Lick v. Owen, 47 Cal. 256; Wilson v. Fitch, 41 Cal. 379; § 164, post.

§ 77. **Partial defenses.**—A party may allege and prove a partial defense, but it must be pleaded as such.¹ And it is held, that an answer which is pleaded to the whole, but which only goes to a part of a complaint, is insufficient on demurrer, although the facts alleged would constitute a partial defense.² In New York, a partial defense may be set forth in the answer, but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action therein set forth.³ And matter tending only to mitigate or reduce damages in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense, within the meaning of this provision.⁴ In any such action, it is competent for the defendant to plead and prove any facts which tend to rebut the existence of malicious motives on his part.⁵ But it seems that he is precluded from proving circumstances by way of mitigation only, which are not set forth in the answer.⁶ The rules by which the sufficiency of pleading is ordinarily determined cannot, however, be applied in all their strictness to a partial defense by way of mitigating circumstances, and allegations of facts by way of mitigation should not be stricken out, unless it is clear that under no possible circumstances could the matter pleaded have the bearing claimed for it.⁷ If the pleading sought to be stricken out contains the semblance of a defense, it ought not to be changed by the court.⁸

1 *Fitzsimmons v. Insurance Co.* 18 Wis. 234; *Davenport etc. Co. v. City of Davenport*, 15 Iowa, 6; *Webb v. Nickerson*, 4 West C. Rep. 485; 11 *Oreg.* 382; *Ward v. Polk*, 70 Ind. 309. And see *Bennett v. Matthews*, 64 Barb. 410; *Hager v. Tibbits*, 2 Abb. Pr. N. S. 97. A defense, in the sense of the Code, is a right possessed by the defendant, which, either partially or wholly, defeats the plaintiff's claim: *Bush v. Prosser*, 11 N. Y. 347, 352; *Utah etc. Railw. Co. v. Crawford*, 1 Idaho, 770; *Railroad Co. v. Washburn*, 5 Neb. 125.

2 *Reynolds v. Roundabush*, 59 Ind. 483; *Fitzsimmons v. Insurance Co.* 18 Wis. 234; *Peck v. Purchin*, 52 Iowa, 46; *McMahan v. Spinning*, 51 Ind. 187. In Ohio, it is not necessary that an answer to a petition

seeking equitable relief should set up a complete defense to the action. It is enough that it deny, or confess and avoid, some material part of the plaintiff's case, so as to modify or abridge his right to relief, and a demurrer to such answer raises no question of its sufficiency as a complete bar to the action: *Peebles v. Isaminger*, 18 Ohio St. 490. And see *Weaver v. Carnahan*, 37 Ohio St. 363; *Willis v. Taggard*, 6 How. Pr. 433.

3 N. Y. Code Civ. Proc. § 508.

4 N. Y. Code Civ. Proc. § 508; N. Y. Code Civ. Proc. § 536. And see *Hatfield v. Lasher*, 17 Hun, 23; 81 N. Y. 246.

5 *Bradner v. Faulkner*, 93 N. Y. 515; 19 N. Y. Week. Dig. 134; *Wandell v. Edwards*, 5 Hun, 498.

6 *Bradner v. Faulkner*, 93 N. Y. 515; 18 N. Y. Week. Dig. 124. But see *Wandell v. Edwards*, 25 Hun, 498.

7 *Bradner v. Faulkner*, 93 N. Y. 515; 18 N. Y. Week. Dig. 134.

8 *Walter v. Fowler*, 85 N. Y. 621.

§ 78. Joinder of defenses.—Under the Code system of pleading, the defendant may join in his answer as many defenses as he may have,¹ and the objection of inconsistency between them is not available,² except that a sworn answer must not deny in one sentence what it admits in another sentence.³ The inconsistent defenses which are allowed to be pleaded in a verified answer are those in which the inconsistency arises rather by implication of law, being in the nature of pleas of confession and avoidance, as contradistinguished from denials where the party impliedly or hypothetically admits, for the purpose of that particular defense, a fact which he notwithstanding insists does not in truth exist.⁴ A party does not waive the effect of a denial contained in one part of his answer by setting up, in an appropriate manner, new or affirmative matter.⁵ In an action on a note, denial of its execution, and payment, release, or other discharge, are not necessarily inconsistent.⁶ Denial and justification may be pleaded together;⁷ so of denial and the Statute of Limitations;⁸ so of a defense on the merits, and a former suit pending.⁹ In an action for a breach of a contract of sale, the defendant may set up a rescis-

sion of the contract on the ground of fraud or mistake, and also breach of warranty on the part of the plaintiff.¹⁰ In an action of trespass, denial of the plaintiff's title, and a license to do the act complained of, are not inconsistent defenses.¹¹ So usury, extension of time, and payment are not inconsistent defenses in an answer of a surety on a promissory note.¹² So a denial that the defendant ever received any choses in action, as collateral, is not inconsistent with the defense that, if received by him, they were lost without his fault.¹³ But a denial of the execution of an instrument, and that it was executed under duress, were held to be inconsistent and insufficient.¹⁴ So of a denial of the contract, and an allegation of non-performance by the adverse party.¹⁵ So the defendant, a carrier by water, was not permitted to answer that he was not the owner of the vessel, and that the property shipped was delivered to the plaintiff.¹⁶ And denial and tender were held to be inconsistent defenses, which could not be pleaded to the same cause of action.¹⁷ An equitable defense may be pleaded to a legal cause of action.¹⁸ So the distinction between pleas in abatement and in bar having been abolished, both may be set up in the same answer,¹⁹ and both be tried and decided at one time.²⁰

1 N. Y. Code Civ. Proc. § 507; Cal. Code Civ. Proc. § 441; 2 Ohio Rev. Stats. § 5071; *Boyce v. Brown*, 3 How. Pr. 391; 7 Barb. 80; *Knight v. Buser*, 8 Am. L. Rec. 28.

2 *Bruce v. Burr*, 67 N. Y. 237. And see *Billings v. Drew*, 52 Cal. 565; *Bell v. Brown*, 22 Cal. 671; *Stiles v. Comstock*, 9 How. Pr. 48; *Cohrs v. Fraser*, 5 S. C. 351; *Tucker v. Edwards*, Sup. Ct. Colo. 3 Pacif. L. Rep. 233.

3 *Hensley v. Tartar*, 14 Cal. 508; *Kuhland v. Sedgwick*, 17 Cal. 123; *Citizens' Bank v. Closson*, 29 Ohio St. 78; *Storer v. Coe*, 2 Bosw. 662; *Burnham v. Anson*, 2 Utah, 433.

4 *Bell v. Brown*, 22 Cal. 671. And see *Howard v. Throckmorton*, 48 Cal. 482.

5 *Billings v. Drew*, 52 Cal. 565.

6 *Kellogg v. Baker*, 15 Abb. Pr. 236; *Nelson v. Brodhack*, 44 Mo. 496; *Pavey v. Pavey*, 30 Ohio St. 600; *Mott v. Burnett*, 2 Smith, E. D. 50.

7 *Hackley v. Ogmun*, 10 How. Pr. 44; *Hallenbeck v. Clow*, 9 How. Pr. 289; *Murphy v. Carter*, 1 Utah, 17; *Derby v. Gallup*, 5 Minn. 119.

8 *Willson v. Cleaveland*, 30 Cal. 192; *Nelson v. Brodhack*, 44 Mo. 596; *May v. Burk*, 80 Mo. 675.

9 *Gardner v. Clark*, 21 N. Y. 399.

10 *Bruce v. Burr*, 67 N. Y. 237.

11 *Booth v. Sherwood*, 12 Minn. 426.

12 *Shed v. Augustine*, 14 Kan. 282.

13 *Willard v. Gles*, 24 Wis. 319.

14 *Wright v. Bacheller*, 16 Kan. 259.

15 *Lewis v. Acher*, 11 How. Pr. 163.

16 *Arnold v. Dimond*, 4 Sand. 680.

17 *Livingston v. Harrison*, 2 Smith, E. D. 197. If inconsistent defenses are set up in an answer, advantage of it must be taken by motion or demurrer, otherwise the defect is waived: *Conway v. Clinton*, 1 Utah, 215.

18 *Wa Ching v. Constantine*, 1 Idaho, 266; *Kahn v. Old Tel. Min. Co.* 2 Utah, 174.

19 *Gardner v. Clark*, 21 N. Y. 399; *Dawley v. Brown*, 9 Hun, 461; *Board of Supervisors v. Van Stralen*, 45 Wis. 675; *Erb v. Perkins*, 32 Ark. 428.

20 *Dawley v. Brown*, 9 Hun, 461; *Sweet v. Tuttle*, 14 N. Y. 465. See *Fordyce v. Hathorn*, 57 Mo. 120. By statute in Indiana, an answer in abatement must precede, and cannot be pleaded with an answer in bar, and the issue thereon must be tried first and separately: *Dwiggins v. Clark*, 94 Ind. 49.

§ 79. **Joint answers.**—There is said to be no limit to the right of proper parties defendant to join in an answer, the averments of which they are able and willing to verify in accordance with the requirements of the Code in that respect.¹ But where a defense pleaded jointly by several defendants is bad as to one, it is bad as to all;² as where several are sued on a joint obligation, one of whom is an infant, if he pleads his infancy severally, it is a defense, but being no defense to the others, if pleaded jointly it is insufficient.³ But it is held, that when a joint answer of several defendants denies an allegation in the complaint, which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer must be held good for the defendants as to whom the plaintiff

must prove such allegation.⁴ If a defense set up by one defendant is joint in its nature, and goes to the validity of the cause of action, it will, to the extent it may be established, inure to the benefit of all the defendants;⁵ as where the makers of a note are sued jointly, an answer by one, setting up as a defense that the consideration of the note was usurious, inures to the benefit of all.⁶ So in actions of tort, where the wrong is joint and several, an answer by one of the defendants showing that the plaintiff could have no cause of action against any of them, if sustained, will operate to the benefit of all the defendants.⁷ The rule that all dilatory defenses to be good must be common to all the defendants, and pleaded by all,⁸ was held to be unchanged by the Code.⁹

1 Union Bank etc. v. Bell, 14 Ohio St. 211. And see Davis v. Davidson, 4 McLean, 138. In an action against several defendants, whose liability is joint and whose interest in the action is identical, the defendants will not be permitted to sever in their defense: Von Glahn v. De Rossett, 76 N. C. 292.

2 Ward v. Bennett, 20 Ind. 440; Black v. Richards, 95 Ind. 184.

3 Morton v. Morton, 10 Iowa, 58.

4 Bank of Cooperstown v. Corlies, 1 Abb. Pr. N. S. 412. See McKyring v. Bull, 16 N. Y. 297; Feeney v. Mazellu, 87 Ind. 220.

5 Sprague v. Childs, 18 Ohio St. 107.

6 Miller v. Longacre, 26 Ohio St. 291.

7 Williams v. McGrade, 13 Minn. 46.

8 See Shannon v. Comstock, 21 Wend. 457.

9 Hurley v. Second Build. Assoc. 15 Abb. Pr. 206, n.

§ 80. Each defense to be complete. — By the well settled rules of pleading, each distinct defense, stated separately in an answer, must be complete in itself;¹ and if it be defective in any material averment, it cannot be aided by reference to other defenses in the same answer,² unless it expressly refers to and adopts them.³ Each defense must of itself be a complete answer to the whole complaint, if addressed to the whole;⁴ or if it be professedly a partial defense, it must fully answer so much

of the complaint as it purports to answer, unaided by matter in another defense;⁵ if not thus complete and sufficient, it is demurrable.⁶ The different defenses are required to be separately stated and numbered, and unless a defense is interposed as an answer to the entire complaint or petition, it should distinctly refer to the cause of action which it is intended to answer.⁷ But where the defect of not separately stating and numbering the different defenses is not called to the attention of the court by motion, it is held to be waived.⁸ No formal commencement or conclusion is required to mark each separate defense.⁹ A commencement in the words "and for a further defense" is held sufficient;¹⁰ but it is otherwise of the words "and defendant further says."¹¹

1 *Reld v. Huston*, 55 Ind. 173; *Smith v. Little*, 67 Ind. 549; *Benedict v. Seymour*, 6 How. Pr. 298; *Spencer v. Babcock*, 22 Barb. 326; *Siter v. Jewett*, 33 Cal. 92.

2 *Catlin v. Pedrick*, 17 Wis. 88; *Loosey v. Orser*, 4 Bosw. 391; *Lynn v. Crim*, 96 Ind. 89; *Entsminger v. Jackson*, 73 Ind. 144.

3 *Hammond v. Earle*, 58 How. Pr. 426; *Baldwin v. U. S. Tel. Co.* 54 Barb. 517. And see *Swift v. Kingsley*, 24 Barb. 541; *Ayrault v. Chamberlain*, 33 Barb. 229.

4 *Baldwin v. U. S. Tel. Co.* 54 Barb. 517.

5 *Frazee v. Frazee*, 70 Ind. 411; *Lash v. Rendell*, 72 Ind. 475; *State v. Roche*, 94 Ind. 372, 376.

6 *Lash v. Rendell*, 72 Ind. 475; *Nat. Bank v. Green*, 33 Iowa, 140.

7 See N. Y. Code Civ. Proc. § 507; Cal. Code Civ. Proc. § 441; *Kneedler v. Sternbergh*, 10 How. Pr. 67; *Norman v. Rogers*, 59 Barb. 275; *Everett v. Waymire*, 30 Ohio St. 308.

8 *Truitt v. Baird*, 12 Kan. 420. See *Cannon v. Krelpe*, 14 Kan. 324.

9 *Bridge v. Payson*, 5 Sand. 210.

10 *Benedict v. Seymour*, 6 How. Pr. 298. And see *Loosey v. Orser*, 4 Bosw. 391; *Lippencott v. Goodwin*, 8 How. Pr. 242.

11 *Lippencott v. Goodwin*, 8 How. Pr. 242.

§ 81. **Subscription—Verification.**—An answer is required to be subscribed by the party or his attorney.¹ And where the defect of a want of signature exists, a motion may be properly interposed to strike the pleading from the files.² The signature may be printed

instead of being written.³ And if the name of the attorney of record appears in the case at the foot of the answer, in connection with the name of associate counsel, it is sufficient;⁴ the court is not bound to try the question whether the signature was genuine, or put there by associate counsel without authority.⁵ When the complaint or petition is verified by affidavit, the answer should be verified also.⁶ But an answer may be verified although the complaint is not.⁷ Verification of the answer does not impair its effect as a pleading, although it is made in a case where the law does not require the answer to be verified.⁸ It is expressly provided in some States that the answer of an infant by his guardian *ad litem* need not be verified.⁹ So the verification may be omitted in every case where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution.¹⁰ So it may be omitted in divorce or alimony cases,¹¹ and may be omitted in an action for libel, even though the complaint be verified.¹² The verification is no part of a pleading, but is only a formality required to give it solemnity;¹³ the omission to verify, where necessary, is an irregularity which may be waived, and the right to take advantage of it is lost by long delay.¹⁴ It is too late to object to want of verification for the first time in the court of review.¹⁵ Nor can the objection be taken at the trial,¹⁶ and is waived by pleading over or demurring.¹⁷ Where service of an answer to a verified complaint, consisting of a general denial only, was admitted by the plaintiff's attorney, and "verification thereof waived," it was held that the waiver of verification did not admit the sufficiency of the answer, or dispense with the necessity of a specific denial.¹⁸ The mode of objecting where the answer is not verified, or is defectively verified, is by motion to

strike from the record.¹⁹ Such objection cannot be reached by a demurrer.²⁰ In New York, where the copy of a pleading is served without a copy of a sufficient verification, in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice, with due diligence, to the attorney of the adverse party that he elects so to do.²¹ Verification of a pleading is not necessary in order to vest jurisdiction, and if defective may be amended, or if wanting may be supplied.²²

1 Cal. Code Civ. Proc. § 446; 2 Ohio Rev. Stats. § 5102; N. C. Code Civ. Proc. § 116; *Harris v. Osenback*, 13 Ind. 445; *State v. Chadwick*, 103 Oreg. 427. In New York, the answer must be subscribed by the defendant's attorney, who must add to his signature his office address, with other particulars prescribed by the Code: N. Y. Code Civ. Proc. § 421.

2 See *Fritz v. Barnes*, 6 Neb. 435; *Graham v. McCann*, 5 How. Pr. 353; *Railroad Co. v. Owen*, 8 Kan. 409; *Lannbeer v. Allen*, 2 Sand. 648; *Dixey v. Pollock*, 8 Cal. 570; *Conn v. Rhodes*, 25 Ohio St. 644.

3 *Hancock v. Bowman*, 49 Cal. 413.

4 *Willson v. Cleaveland*, 30 Cal. 192.

5 *Willson v. Cleaveland*, 30 Cal. 192.

6 See Cal. Code Civ. Proc. § 446; N. Y. Code Civ. Proc. § 523; *Arizona Comp. Laws*, p. 894, § 51.

7 *Levi v. Jakeways*, 4 How. Pr. 126.

8 *Porter v. Bichard*, 1 Ariz. 87.

9 See N. Y. Code Civ. Proc. § 523; 2 Ohio Rev. Stats. § 5103; *Neb. Code Civ. Proc.* § 114.

10 Cal. Code Civ. Proc. § 446; *Neb. Code Civ. Proc.* § 114; *Davenport Glucose Manuf. Co. v. Taussig*, 31 Hun, 534; 15 N. Y. Week. Dig. 408. And see *Fredericks v. Taylor*, 14 Abb. Pr. N. S. 77; 52 N. Y. 596; *Blaisdell v. Raymond*, 5 Abb. Pr. 144; 6 Abb. Pr. 143.

11 2 Ohio Rev. Stats. § 5096. And see *Anable v. Anable*, 24 How. Pr. 92; *Sweet v. Sweet*, 15 How. Pr. 169. But see *Olney v. Olney*, 7 Abb. Pr. 350.

12 *Wilson v. Bennett*, 2 Civ. Proc. R. 34. Whenever the defendant would be privileged from testifying, as a witness, to the truth of any matter denied by the answer, verification may be omitted: N. Y. Code Civ. Proc. § 523; *Clapper v. Fitzpatrick*, 3 How. Pr. 314; *Wheeler v. Dixon*, 14 How. Pr. 151; *People v. Kelly*, 24 How. Pr. 369; *Anderson v. Doty*, 19 N. Y. Week. Dig. 440. In California, when the State, or any officer of the State, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or unless an officer of the State, in his official capacity, is defendant: *Code Civ. Proc.* § 446.

13 *Pence v. Durbin*, 1 Idaho, 550, 552; *George v. McAvoy*, 6 How. Pr. 200.

14 *Wilson v. Bennett*, 2 Civ. Proc. R. 34; *Hayward v. Grant*, 13 Minn. 163.

15 *Moses v. Risdon*, 46 Iowa, 251; *Payne v. Flournoy*, 29 Ark. 500; *McCullough v. Clark*, 41 Cal. 238. But see *Alsbaugh v. Winstead*, 79 N. C. 523.

16 *Schwarz v. Oppold*, 74 N. Y. 307. And see *Butler v. Church*, 14 Bush, 540.

17 *State v. Chadwick*, 10 Oreg. 423; *Pudney v. Burkhart*, 62 Ind. 179; *State v. Bath*, 21 Kan. 583; *Hughes v. Feeter*, 18 Iowa, 142.

18 *Harney v. Porter*, 62 Cal. 511.

19 *Warner v. Warner*, 11 Kan. 121; *Pence v. Durbin*, 1 Idaho, 550; *Sutherland v. Hankins*, 56 Ind. 343; *Fritz v. Barnes*, 6 Neb. 435; *Swihart v. Shaffer*, 87 Ind. 208.

20 *Swihart v. Shaffer*, 87 Ind. 208.

21 N. Y. Code Civ. Proc. § 523. And see *Snape v. Gilbert*, 13 Hun, 494; *Hull v. Ball*, 14 How. Pr. 305.

22 *Dorrington v. Meyer*, 8 Neb. 211; *Johnson v. Jones*, 2 Neb. 126; *Jones v. U. S. State Co.*, 16 How. Pr. 129; *Bragg v. Bickford*, 4 How. Pr. 21; *Rush v. Rush*, 46 Iowa, 648. But see *Stevens v. White*, 1 West. Law Month. 394. It seems that it is proper when a defendant claims the right to serve an unverified answer, that he should serve therewith an affidavit showing his excuse for not verifying his answer; *Roache v. Kivlin*, 25 Hun, 160. Compare *Anderson v. Doty*, 19 N. Y. Week. Dig. 440.

§ 82. **Verification, by whom and how made.** — Generally speaking, verification is required to be made by the affidavit of the party, or, in certain cases, by his agent or attorney, or other person having a knowledge of the facts.¹ If several are united in interest, and plead together, the affidavit may be made by one of them.² But all parties not united in interest should verify.³ If the action is defended for the immediate benefit of one not a party to the record, but who is the party in interest, the pleading may be verified by him.⁴ When a domestic corporation is the party, the verification may be made by an officer thereof,⁵ as, for instance, by a director.⁶ Where the party is a foreign corporation, the verification may be made by its agent or attorney.⁷ Unless the wife is a mere nominal party, she should join with the husband in the verification.⁸ The form of the verification is sufficient if it conform substantially to the statute.⁹ The verification should be signed

by the deponent,¹⁰ and it should not be made before the party's attorney as notary.¹¹ It seems that no venue is required to the affidavit.¹² And a certificate, "subscribed and sworn to before me," is held to be sufficient in form for a jurat.¹³ The courts are not inclined to favor objections on the ground of insufficient verification.¹⁴ When the verification is made by the attorney, or any other person than the party, he must set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party.¹⁵ Under the New York Code,¹⁶ a party has no right to interpose an unqualified denial in a verification unless it be founded upon personal knowledge, and where he has not personal knowledge, but has knowledge or information sufficient to form a belief, he is not only permitted but bound, at his peril, to deny upon information and belief.¹⁷

1 See N. Y. Code Civ. Proc. § 525; 2 Ohio Rev. Stats. § 5102; N. C. Code Civ. Proc. § 117; Cal. Code Civ. Proc. § 446; Patterson v. Ely, 19 Cal. 23; Drevert v. Appsert, 2 Abb. Pr. 165; Jaillard v. Tomes, 3 Abb. N. C. 24.

2 N. Y. Code Civ. Proc. § 525; Zoellner v. Newberger, 1 N. Y. Month. Law Bull. 29.

3 Gray v. Kendall, 10 Abb. Pr. 66; 5 Bosw. 666; Hull v. Ball, 14 How. Pr. 305; Andrews v. Storms, 5 Sand. 609.

4 Taber v. Gardner, 6 Abb. Pr. N. S. 147.

5 N. Y. Code Civ. Proc. § 525, subd. 1.

6 Bigelow v. Whitehall Manuf. Co. 1 City Ct. R. (N. Y.) 138.

7 N. Y. Code Civ. Proc. § 525, subd. 3.

8 Reed v. Butler, 2 Hilt. 589; Youngs v. Seely, 12 How. Pr. 395. Compare Hartley v. James, 18 Abb. Pr. 299.

9 Ely v. Frisbie, 17 Cal. 250; Radway v. Mather, 5 Sand. 654; Sexaner v. Bowen, 3 Daly, 405; 10 Abb. Pr. N. S. 355; Waggoner v. Brown, 8 How. Pr. 212.

10 Lalmbeer v. Allen, 2 Sand. 648.

11 Post v. Coleman, 9 How. Pr. 64; Peyser v. McCormack, 7 Hun, 300; 51 How. Pr. 205; Warner v. Warner, 11 Kan. 121. But see Kuhlman v. Sedwick, 17 Cal. 123; Young v. Young, 18 Minn. 90.

12 Brotton v. Allston, 2 West. Law Month. 588. And see Levy v. Wilson, 43 Iowa, 605; Young v. Young, 18 Minn. 90. But compare Lane v. Morse, 6 How. Pr. 394; Blair v. West Point Manuf. Co. 7 Neb. 146.

13 Sargent v. Townsend, 2 Dian. 472.

14 *Wilkin v. Gilman*, 13 How. Pr. 225.

15 See N. C. Code Civ. Proc. § 117; N. Y. Code Civ. Proc. § 526; *Fitch v. Bigelow*, 5 How. Pr. 237; *Treadwell v. Fassett*, 10 How. Pr. 184; *Boston Locomotive Works v. Wright*, 15 How. Pr. 253; *Lions v. Murat*, 54 How. Pr. 23; *Cropsey v. Wiggernhorn*, 3 Neb. 108.

16 Code Civ. Proc. § 526.

17 *Brotherton v. Downey*, 59 How. Pr. 206. See § 62, *ante*; *Macanley v. Bromell etc. Printing Co.* 14 Abb. N. C. 316; *Ledgerwood Manuf. Co. v. Baird*, 14 Abb. N. C. 318.

§ 83. **Supplemental answer.**—At common law, if a matter of defense arose after issue, the defendant might set it up by a plea known as a plea *puis darrein continuance*;¹ and facts arising after issue could only be so pleaded.² Under the Code system, the supplemental answer takes the place of the former plea *puis darrein continuance*, and any defense which a party could have set up under that plea, he may set up by a supplemental answer.³ But it is generally held that the supplemental answer, unlike the plea of *puis darrein continuance*, is not a waiver of defenses before interposed, and is not confined to matters arising since the last continuance.⁴ The scope of a supplemental pleading is, to set up circumstances happening after the commencement of the action, or after the original pleading was put in, or of which the party was ignorant at the time of putting in his original pleading.⁵ And ordinarily, if the facts show that a party is entitled to serve his supplemental pleading, he ought to be allowed to do so, unless the pleading is clearly bad or frivolous.⁶ The allowance of a supplementary answer is said to be discretionary with the court.⁷ But it is held in New York, that the court has only the same discretion as a court had under the former practice on a motion to strike a plea *puis darrein* from the files.⁸ And that leave must be granted, unless the facts disclose a case calling for the exercise of discretion.⁹ If a party has been guilty of laches, it is clearly within the discretion of the court

to refuse him leave to serve a supplemental answer.¹⁰ But such leave will not usually be denied upon the ground that the facts sought to be set forth therein do not constitute a defense to the action.¹¹ Where the sufficiency of the proposed supplemental answer, setting up newly discovered facts, is a matter of doubt, the court will not prejudge the validity of the defense on a motion, but will permit the defense to be set up if the defendant be free from laches.¹² The court should consider all the circumstances, and grant or refuse the application as may be just and proper in the particular case.¹³ When the facts sought to be pleaded in a supplemental answer amount to an entire satisfaction of the cause of action, it is the duty of the court to allow it.¹⁴ But it should not be allowed to set up a technical defense to defeat a just claim,¹⁵ nor to set up matter of defense which was known to the defendant at the time his former answer was put in;¹⁶ so where two proceedings are pending between the same parties for the same cause of action, the pendency of the first commenced is a defense to the one last commenced, and leave to file a supplemental answer in the action first commenced will not be granted where the matter proposed to be pleaded, being a decision in the second action, cannot be a bar to the first action.¹⁷ A supplemental answer setting up the defendant's discharge in bankruptcy is often allowed,¹⁸ but is sometimes denied upon the ground of laches.¹⁹ Release after issue should be set up by supplemental answer.²⁰ And in an action for divorce, a supplemental answer was allowed, setting up the plaintiff's adultery.²¹ So a supplemental answer, setting up the facts of a settlement between the parties, was allowed, the court being satisfied that the settlement was not made to defraud the plaintiff's attorney.²² And any title to premises in dispute that accrued to

the defendant after the commencement of the suit must be set up by a supplemental answer.²³ The matter proposed to be set up in a supplemental answer must be true, and be a good defense.²⁴

1 See *Covell v. Weston*, 20 Johns. 414; *Shawe v. Wilmerden*, 2 Caines, 380; *Broome v. Beardsley*, 3 Caines, 172; *Towns v. Wilcox*, 12 Wend. 502; *Sadler v. Fisher*, 3 Ala. 200; *McDougald v. Rutherford*, 30 Ala. 253.

2 *Hart v. Meeker*, 1 Sand. 623. And see *Jackson v. McConnell*, 11 Johns. 424.

3 *Morel v. Garely*, 16 Abb. Pr. 269; *Bate v. Fellowes*, 4 Bosw. 638; *Drought v. Curtiss*, 8 How. Pr. 56; *Hoyt v. Sheldon*, 4 Abb. Pr. 59; 6 Duer, 661; 19 N. Y. 207.

4 *Medbury v. Swan*, 46 N. Y. 200, 203. See *Brown v. Richardson*, 4 Robt. 603; *Slauson v. Englehart*, 34 Barb. 198; *Dunn v. Baker*, 12 How. Pr. 521. The New York Code now provides, that the party may apply for leave to make a supplemental pleading, either in addition to or in place of the former pleading: N. Y. Code Civ. Proc. § 544. In Missouri, by filing a supplemental answer and going to trial on it, the defendant abandons his first answer, and all matters alleged therein not re-stated in his supplemental answer: *Rubelman v. McNichol*, 13 Mo. App. 584.

5 *McMahon v. Allen*, 12 How. Pr. 39; 1 Hilt. 103; *Hendricks v. Decker*, 35 Barb. 298; *Hall v. Olney*, 65 Barb. 27; *Lampson v. McQueen*, 15 How. Pr. 345; *Williams v. Hernon*, 16 Abb. Pr. 173.

6 *Mitchell v. Allen*, 25 Hun, 543.

7 *Tefft v. Flery*, 22 Kan. 753; *Harding v. Minear*, 54 Cal. 502; *Matteson v. Curtis*, 14 Wis. 436.

8 *McDonald v. Davis*, 12 Hun, 95; *Holyoke v. Adams*, 1 Hun, 223; 2 Thomp. & C. 1; 59 N. Y. 233; *Spears v. Mayor etc.* 10 Hun, 180; 72 N. Y. 442.

9 *Holyoke v. Adams*, 1 Hun, 223; 2 Thomp. & C. 1; 59 N. Y. 233. And see *Stewart v. Isidor*, 5 Abb. Pr. N. S. 68; *Radley v. Houghtaling*, 4 How. Pr. 251; *Latham v. Richards*, 15 Hun, 129.

10 *Cheeseman v. Sturges*, 19 Abb. Pr. 293; *McDonald v. Davis*, 12 Hun, 95; *Drought v. Curtiss*, 8 How. Pr. 56.

11 *Mitchell v. Allen*, 25 Hun, 543.

12 *Lyon v. Isett*, 42 How. Pr. 155; *Tift v. Bloomberg*, 17 Jones & S. 323; 4 Civ. Proc. R. 348.

13 *Fleischmann v. Bennett*, 79 N. Y. 579.

14 *Drought v. Curtiss*, 8 How. Pr. 56.

15 *Morel v. Garely*, 16 Abb. Pr. 269; *Holyoke v. Adams*, 1 Hun, 223; 2 Thomp. & C. 1; 59 N. Y. 233. See *Tilton v. Morgaridge*, 12 Ohio St. 98.

16 *Houghton v. Skinner*, 5 How. Pr. 420.

17 *Ratzer v. Ratzer*, 2 Abb. N. C. 461. See *Hendricks v. Decker*, 35 Barb. 298.

18 See *Lyon v. Isett*, 42 How. Pr. 155; 11 Abb. Pr. N. S. 353; *Rosenfeld v. Shebel*, 1 N. Y. Month. Law Bull. 4; *Core v. Ford*, 1 N. Y. Month. Law Bull. 12; *Stewart v. Isidor*, 5 Abb. Pr. N. S. 68; *Hadley v. Boehm*, 1 Hun, 304; *Palmer v. Hussey*, 87 N. Y. 303.

19 *Barstow v. Hansen*, 2 Hun, 333; *Medbury v. Swan*, 46 N. Y. 200. And see *Keck v. Werder*, 86 N. Y. 284; *Holyoke v. Adams*, 50 N. Y. 233; *Hellman v. Licher*, 9 Abb. Pr. N. S. 238.

20 *Matthews v. Chickopee Manuf. Co.* 3 Robt. 711. And see *Mitchell v. Allen*, 25 Hun, 543; *Jessup v. King*, 4 Cal. 331.

21 *Strong v. Strong*, 3 Robt. 669, 719; 28 How. Pr. 434; *Burdell v. Burdell*, 3 How. Pr. 216; 2 Barb. 473.

22 *Christy v. Perkins*, 6 Daly, 237.

23 *Kahn v. Old Tel. Min. Co.* 2 Utah, 174; *Moss v. Shear*, 30 Cal. 467; *McMinn v. O'Connor*, 27 Cal. 246. In an action for damages for the conversion of a chattel, facts showing it to have been of little or no value at the time of the conversion may be properly allowed to beset up by supplemental answer in mitigation of damages: *Cothran v. Hanover Nat. Bank*, 8 Jones & S. 401.

24 *Morel v. Garellly*, 16 Abb. Pr. 269. But see *Mitchell v. Allen*, 25 Hun, 543; *Lyon v. Isett*, 42 How. Pr. 155; 11 Abb. Pr. N. S. 353.

CHAPTER V.

COUNTER-CLAIM.

- § 84. Definition and nature of.
- § 85. Extent of, in general.
- § 86. As affected by parties to action.
- § 87. Construction.
- § 88. In action on contract.
- § 89. In cases of tort.
- § 90. In actions for services, etc.
- § 91. Assault and battery.
- § 92. In actions for divorce.
- § 93. In foreclosure cases.
- § 94. Between landlord and tenant.
- § 95. In action for goods sold.
- § 96. In actions relating to real property.
- § 97. In particular cases.
- § 98. In what cases not pleadable.
- § 99. Claims in different rights.
- § 100. Defendant not bound to set up.
- § 101. How pleaded.
- § 102. Cross-pleading.

§ 84. **Definition and nature of.**—The defendant's answer may contain a counter-claim, that is, a statement of new matter constituting a counter-claim.¹ And the word "counter-claim," as employed in Code pleading, is construed to mean an opposition claim, or demand of something due—a demand of something which of right belongs to the defendant in opposition to the right of the plaintiff.² The term, of itself, imports a claim opposed to, or which qualifies, or at least in some degree affects, the plaintiff's cause of action.³ It is held to be an affirmation of a cause of action against the plaintiff, in the nature of a cross-action, and upon which the defendant may have an affirmative judgment against the plaintiff.⁴ All claims and de-

mands of the defendant against the plaintiff in an action, which if allowed will reduce or overrun the plaintiff's claim, may be said to be "counter-claims," that is, adverse to that of the plaintiff.⁵ But whether they may be set up in defense of the action depends upon the question, whether they come within the provisions of the statute limiting and defining the counter-claims which may be thus set up.⁶ The general test as to the admissibility of a counter-claim is, whether at the time the action was commenced, an action, legal or equitable, could have been maintained upon the counter-claim against the plaintiff.⁷ A counter-claim is a cause of action in favor of the defendant against the plaintiff,⁸ and the leading object of its creation was to enable parties to settle and adjust all their cross-claims in a single action, thus avoiding multiplicity of suits, and often securing better justice between the parties.⁹ But an answer expressly pleading facts as a "defense," and concluding with a prayer for affirmative relief, does not constitute a counter-claim.¹⁰ And it is held, that no single pleading can be made to perform the double function of a defense and a counter-claim.¹¹

1 See Cal. Code Civ. Proc. § 437, subd. 2; N. Y. Code Civ. Proc. § 500, subd. 2; *Town v. Bringolf*, 47 Iowa, 133.

2 *Silliman v. Eddy*, 8 How. Pr. 122. And see *Great West. Ins. Co. v. Pierce*, 1 Wyom. 45, 49; *Roscoe v. Mason*, 7 How. Pr. 121; *Conner v. Winton*, 7 Ind. 523; *Furness v. Booth*, Law R. 4 Ch. Div. 586.

3 *Dietrich v. Koch*, 35 Wis. 618; *Nat. Fire Ins. Co. v. McKay*, 21 N. Y. 191; *Prouty v. Eaton*, 41 Barb. 409; *Mattoon v. Baker*, 24 How. Pr. 329. And see *Koempel v. Shaw*, 13 Minn. 488; *Steele v. Etheridge*, 15 Minn. 510.

4 *Clarkson v. Manson*, 60 How. Pr. 45, 48; *Fettretch v. McKay*, 47 N. Y. 427; *Garrett v. Love*, 89 N. C. 205.

5 *Gage v. Angell*, 8 How. Pr. 336.

6 *Gage v. Angell*, 8 How. Pr. 336.

7 See *Cragin v. Lovell*, 83 N. Y. 253; 2 Civ. Proc. R. 128; *Taylor v. Mayor etc.* 20 Hun, 292; 82 N. Y. 10; *Patterson v. Patterson*, 59 N. Y. 574; *Robinson v. Howes*, 20 N. Y. 84; *Denniston v. Trimmer*, 27 Hun, 393; *Heidenheimer v. Wilson*, 31 Barb. 636; *Vassear v. Livingston*, 18 N. Y. 248; *Holzbauer v. Heine*, 37 Mo. 443.

8 *Belleau v. Thompson*, 33 Cal. 495; *Chamboret v. Cagney*, 41 How. Pr. 129; 10 Abb. Pr. N. S. 31; *Matteson v. Ellsworth*, 28 Wis. 254; *White v. Reagan*, 32 Ark. 281; *Hay v. Short*, 49 Mo. 138. It is a distinct and independent cause of action, and when properly stated as such, with a prayer for relief, the defendant becomes, in respect to the matters alleged by him, an actor, and there are then really two simultaneous actions pending between the same parties, wherein each is at the same time both a plaintiff and a defendant: *Francis v. Edwards*, 77 N. C. 271, 275. And see *Davidson v. Remington*, 12 How. Pr. 310.

9 *Waddell v. Darling*, 51 N. Y. 330; *Allen v. Shackleton*, 15 Ohio St. 145, 148.

10 *Resch v. Senn*, 31 Wis. 138; *Gaff v. Greer*, 88 Ind. 122. Compare *Burrall v. De Groot*, 5 Duer, 379; *Quebec Bank v. Weggaud*, 30 Ohio St. 128.

11 *Campbell v. Routt*, 42 Ind. 410; *Blakely v. Boruff*, 71 Ind. 93; *Gaff v. Greer*, 88 Ind. 122. But compare *Lancaster etc. Manuf. Co. v. Colgate*, 12 Ohio St. 344.

§ 85. *Extent of, in general.*—The term “counter-claim,” as used in the Codes of many of the States, is sufficiently comprehensive to embrace any claim or demand of any right, or of any amount due or supposed to be due, adverse or in opposition to the claim or demand of the plaintiff.¹ It embraces all matters which, under previous statutes, might have been the subject of set-off, and all claims which, under the adjudication of the courts, might have been interposed as defenses by way of recoupment.² In short, it secures to a defendant all the relief which either an action at law, or a bill in equity, or a cross-bill would have secured on the same state of facts.³ In the Codes of other States the term is less comprehensive, being limited to claims which might have been formerly interposed as defenses by way of recoupment,⁴ while separate provision is made for the defense of set-off.⁵ In the latter States, a counter-claim is like recoupment at common law, and must be a cause of action in favor of the defendant against the plaintiff, arising out of the contract or transaction set forth in the complaint or petition, as the foundation of the plaintiff’s claim, or connected with the subject of the action.⁶ But in the former States, in

an action arising on contract, the defendant is likewise allowed to set up as a counter-claim any other cause of action arising also on contract, express or implied, and existing at the commencement of the action.⁷ So it is generally held, that the counter-claim in such case may be for either liquidated or unliquidated damages.⁸ But in States where a set-off is provided for, in addition to counter-claim, in the more restricted sense stated above, it is held that unliquidated demands cannot be made the subject of set-off.⁹ A counter-claim may be of an equitable or legal defense;¹⁰ and a counter-claim of an equitable nature may be interposed, although the claim or demand mentioned in the complaint or petition is purely of a common-law nature, or for the recovery of money only.¹¹

1 See *Gage v. Angell*, 8 How. Pr. 335; *Chamboret v. Cagney*, 41 How. Pr. 125; 10 Abb. Pr. N. S. 31; 2 Sweeny, 378.

2 *Clinton v. Eddy*, 37 How. Pr. 23; 1 *Lana*, 61; 54 *Barb.* 54; *Lignot v. Redding*, 4 *Smith*, E. D. 285; *Ogden v. Coddington*, 2 *Smith*, E. D. 317; *Wilder v. Boynton*, 63 *Barb.* 547; *Boston Mills v. Eull*, 37 How. Pr. 299; 6 Abb. Pr. N. S. 319; *Heckman v. Swartz*, 55 *Wis.* 173; *Neal v. Lea*, 64 N. C. 568. But a distinction is occasionally made: See *Crennan v. Underhill*, 13 N. Y. Week. Dig. 432; *Elwell v. Skiddy*, 77 N. Y. 282, 294.

3 *Boston Mills v. Eull*, 37 How. Pr. 299; 6 Abb. Pr. N. S. 319; *Leavenworth v. Packer*, 52 *Barb.* 137.

4 See *Woodruff v. Garner*, 27 *Ind.* 4; *Standley v. Mut. Life Ins. Co.* 95 *Ind.* 254; *Bloom v. Lehman*, 27 *Ark.* 490; *Hudson v. Snipes*, 40 *Ark.* 75.

5 2 *Ohio Rev. Stats.* § 5075; *Wagner v. Stocking*, 22 *Ohio St.* 297; *Ark. Dig. (Gantt)* § 4569; *Kan. Code Civ. Proc.* § 98; *Carver v. Shelley*, 17 *Kan.* 472, 475; *Standley v. Mut. Life Ins. Co.* 95 *Ind.* 262; *Ky. Code*, § 125; *Neb. Code Civ. Proc.* § 104.

6 *Hudson v. Snipes*, 40 *Ark.* 75; *Hinkle v. Margerum*, 50 *Ind.* 240; *Williams v. Boyd*, 75 *Ind.* 286; *Standley v. Mut. Life Ins. Co.* 95 *Ind.* 254.

7 *N. Y. Code Civ. Proc.* § 501, subd. 2; *Cal. Code Civ. Proc.* § 438, subd. 2; *N. C. Code Civ. Proc.* § 101, subd. 2; *Wis. Rev. Stats.* § 2656, subd. 2; *S. C. Code Civ. Proc.* § 173, subd. 2; *Minn. Stats.* (1878) p. 721, § 97, subd. 2; 1 *Mo. Rev. Stats.* § 3522; *Parsons v. Sutton*, 66 N. Y. 92.

8 *Lignot v. Redding*, 4 *Smith*, E. D. 285; *Schubart v. Harteau*, 34 *Barb.* 447; *Parsons v. Sutton*, 66 N. Y. 92; *Morrison v. Lovejoy*, 6 *Minn.* 319; *Empire Transp. Co. v. Boggiano*, 52 *Mo.* 294; *Barnes v. McMullins*, 78 *Mo.* 260; *Wheelock v. Pacific etc. Co.* 51 *Cal.* 223, 226. But see *Ricketson v. Richardson*, 19 *Cal.* 330.

9 *Shropshire v. Conrad*, 2 Met. (Ky.) 143; *Boyer v. Clark*, 3 Neb. 161; *Evens v. Hall*, 1 Handy, 434. But the rule is otherwise in Kansas: *Stevens v. Able*, 15 Kan. 584; *Read v. Jeffries*, 16 Kan. 534. So by statute in Indiana: Code Civ. Proc. § 57; Rev. Stats. (1881) § 348.

10 *Currie v. Cowles*, 6 Bosw. 453; *Morgan v. Spangler*, 20 Ohio St. 38; *Wright v. Salisbury*, 46 Mo. 28; *Wemple v. Stewart*, 22 Barb. 154; *Hicksville etc. R. R. Co. v. Long Island R. R. Co.* 48 Barb. 355; *Green Bay etc. Canal Co. v. Hewitt*, Sup. Ct. Wis. 21 N. W. Rep. 216.

11 *Hicksville etc. R. R. Co. v. Long Island R. R. Co.* 48 Barb. 355. And see *Macauley v. Fulton*, 44 Cal. 362; *Bruck v. Tucker*, 42 Cal. 346.

‡ 86. *As affected by parties to action.*— Except as qualified by the provisions of the Codes in some of the States, a counter-claim, in order to be available, must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action.¹ In New York, the counter-claim may, in a proper case, be against the person whom the plaintiff represents.² And in an action by a principal to recover the price of goods sold for him by an agent or factor who did not disclose his principal, the purchaser may set up as a counter-claim a debt due him from such agent or factor, unless he knew at the time that his vendor was acting as an agent or factor, or unless circumstances were brought to his knowledge which would necessarily put him on inquiry in regard thereto.³ But it seems that a purchaser of goods from one doing business ostensibly in his own name, but in fact with a special partner, of which fact the purchaser is ignorant, cannot, when sued by both partners for the price, counter-claim an indebtedness of the general partner incurred prior to the consignment of the goods.⁴ And generally speaking, in an action by a firm, a counter-claim against one member cannot be properly set up by the defendant, and is of no avail in such action.⁵ So in an action against partners, a several claim in favor of one defendant only cannot be enforced as a counter-claim.⁶ Nor can a demand against the members of a firm be set up as a counter-claim in an action by a member of such

firm for a demand due him individually.⁷ Nor can a counter-claim against all the persons who compose a corporation be interposed as against a claim by the corporation as such.⁸ One of two joint defendants cannot interpose a counter-claim, unless there can be, under the pleadings, a several judgment against him.⁹ So, if one defendant is sued upon an individual liability, he cannot interpose a counter-claim jointly in favor of himself, and another against the plaintiff.¹⁰ But a counter-claim, existing in favor of a part of the defendants in an action, may be set up by them, when the answer does not concede a joint liability to the plaintiff on the part of all the defendants.¹¹ Where the wife sues to recover a claim as her separate estate, a debt due the defendant from her husband cannot be pleaded as a counter-claim.¹² A State coming into court as a suitor does not subject itself to an affirmative judgment upon a set-off or counter-claim.¹³ A surety sued upon his obligation cannot avail himself of a claim in favor of his principal against the plaintiff, by way of counter-claim.¹⁴ So in an action against principal and sureties to recover upon an undertaking, a debt due from the plaintiff or his assignor to the principal cannot be interposed as a counter-claim at law.¹⁵ So in an action by a surety against a co-surety for contribution, the latter cannot interpose as a counter-claim an indebtedness of the plaintiff to the principal.¹⁶ And in an action against the guarantor of bonds, where the principal is not joined as defendant, a cause of action against the principal only cannot be interposed as a counter-claim.¹⁷

1 See Cal. Code Civ. Proc. § 438; N. C. Code Civ. Proc. § 101; *Briggs v. Seymour*, 17 Wis. 255; *Babbett v. Young*, 51 Barb. 466; *Lian v. Rugg*, 19 Minn. 181; *Ernst v. Kunkle*, 5 Ohio St. §20; *Merrick v. Gordon*, 20 N. Y. 33; *Thompson v. Stickles*, 40 Barb. 49; *Conibe v. Hollister*, 19 Wis. 269; *Dolph v. Rice*, 21 Wis. 500; *Grier v. Hinman*, 9 Mo. App. 213; *Barnes v. McMullins*, 78 Mo. 280, 269; *King v. Wise*, 43 Cal. 628; *Scott v. Timberlake*, 83 N. C. 382.

2 N. Y. Code Civ. Proc. § 501.

BOONE PLEAD.—13.

3 *Pratt v. Collins*, 20 Hun, 126. And see *Judson v. Stilwell*, 26 How. Pr. 213.

4 *Rosenberg v. Block*, 18 Jones & S. 357.

5 *Goodwin v. Conklin*, 6 N. Y. Week. Dig. 131. And see *Lamb v. Brolaski*, 38 Mo. 51; *Well v. Jones*, 70 Mo. 580. But compare *Sloan v. McDowell*, 71 N. C. 356.

6 *Peabody v. Bloomer*, 5 Duer, 678; 6 Duer, 53; 3 Abb. Pr. 353; *Pinkney v. Keyler*, 4 Duer, 463.

7 *Mynderse v. Snook*, 1 Lans. 488; *Ives v. Miller*, 19 Barb. 196.

8 *N. Y. Ice Co. v. Parker*, 8 Bosw. 688; 21 How. Pr. 302.

9 *Bockover v. Harris*, 11 Jones & S. 548; *Nat. State Bank v. Boylan*, 2 Abb. N. C. 216. See *Gordon v. Swift*, 46 Ind. 208; *Plyer v. Parker*, 10 S. C. 464; *Great West. Ins. Co. v. Pierce*, 1 Wyom. 46; *Curtis v. Sprague*, 41 Cal. 59.

10 *Baldwin v. Berrian*, 53 How. Pr. 81; *Campbell v. Genet*, 2 Hill. 290; *Hopkins v. Lane*, 2 Hun, 36; *Kiersted v. West*, 13 N. Y. Week. Dig. 106; *Hopkins v. Lane*, 87 N. Y. 501; *Baldwin v. Briggs*, 50 How. Pr. 80. See *Collins v. Butler*, 14 Cal. 223; *Russell v. Conway*, 11 Cal. 101.

11 *Clegg v. Cramer*, 32 Hun, 162; 60 How. Pr. 498. And see *McIntosh v. Ensign*, 28 N. Y. 163; *Taylor v. Root*, 4 Keyes, 335.

12 *Palne v. Hunt*, 40 Barb. 75. And see *Carpenter v. Wilverschied*, 5 Minn. 170; *Carpenter v. Leonard*, 5 Minn. 155.

13 *People v. Dennison*, 59 How. Pr. 157; 8 Abb. N. C. 129; 84 N. Y. 272; *Commonw. v. Railroad Co.* 81 Ky. 572. And see *Treasurer v. Thompson*, 65 N. C. 406; *United States v. Eckford*, 6 Wall. 484.

14 *La Farge v. Halsey*, 1 Bosw. 171; 4 Abb. Pr. 397; *People v. Brandreth*, 3 Abb. Pr. N. S. 224; *Lasher v. Williamson*, 55 N. Y. 619; *Emery v. Baltz*, 22 Hun, 434; *Hendry v. Daley*, 17 Hun, 210; *O'Brien v. Karing*, 57 N. Y. 649.

15 *Coffin v. McLean*, 80 N. Y. 560. Compare *Springer v. Dwyer*, 50 N. Y. 19; *Scott v. Timberlake*, 83 N. C. 382; *Harris v. Rivers*, 53 Ind. 216; *Morgan v. Smith*, 7 Hun, 244; *Davis v. Toulmin*, 77 N. Y. 294.

16 *O'Brien v. Karing*, 57 N. Y. 649.

17 *Burroughs v. Garrison*, 15 Abb. Pr. N. S. 144.

§ 87. **Construction.**—The statute allowing counter-claims, being remedial in its nature, should be construed liberally, to the end that controversies between the same parties on the same subject-matter may be adjusted in a single action.¹ Under this liberal construction a counter-claim is good if it alleges matter connected with the subject of the original action, or the transaction out of which it arose.² It is not required that the counter-claim itself shall be founded in contract, or arise out of the contract set forth in the complaint or petition;³ it is sufficient if it arises out of the

transaction set forth in the complaint or petition, or is connected with the subject of the action.⁴ But there must be some legal or equitable connection between the matters pleaded as a counter-claim and the matters alleged in the original complaint.⁵ And although the defendant may have a right of action, if it does not arise out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or is not connected with the subject of the action, or is not a cause of action on contract, it cannot be the subject of a counter-claim.⁶ The words "subject of the action" are construed to mean the subject-matter in dispute, or the facts constituting the plaintiff's cause of action.⁷ The subject of an action is either property (as illustrated by a real action), or a violated right.⁸

1 See *Goebel v. Hough*, 26 Minn. 252; *Ashley v. Marshall*, 29 N. Y. 494; *Glen etc. Manuf. Co. v. Hall*, 61 N. Y. 226, 237; *Standley v. Northw. Mut. Life Ins. Co.* 95 Ind. 254; *Carpenter v. Manhattan Life Ins. Co.* 22 Hun. 49; *Slone v. Slone*, 2 Met. (Ky.) 340.

2 *Conner v. Winton*, 7 Ind. 523; *Leayback v. Jones*, 9 Mo. 470; *White v. Reagan*, 32 Ark. 281; *Hudson v. Snipes*, 40 Ark. 75. And see *Gossard v. Ferguson*, 54 Ind. 519; *Gilpin v. Wilson*, 53 Ind. 443; *Grand Lodge v. Knox*, 20 Mo. 433; *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372; *Eaton v. Woolly*, 23 Wis. 628; *Orton v. Noonan*, 30 Wis. 611; *Miller v. Gaither*, 3 Bush, 152; *Gordon v. Bruner*, 49 Mo. 570; *Bitting v. Thaxton*, 72 N. C. 541; *Walsh v. Hall*, 66 N. C. 233.

3 *Tinsley v. Tinsley*, 15 Mon. B. 454.

4 *Tinsley v. Tinsley*, 15 Mon. B. 454; *James v. Center*, 53 Cal. 31; *Lehmair v. Griswold*, 8 Jones & S. 100; *Fonts v. Mann*, 15 Neb. 172.

5 *Williams v. Boyd*, 75 Ind. 286; *White v. Miller*, 47 Ind. 385; *Washburn v. Roberts*, 72 Ind. 213; *Standley v. Mut. Life Ins. Co.* 95 Ind. 254, 263.

6 *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293, 297; *Lyon v. Petty*, Sup. Ct. Cal. 3 West C. Rep. 107.

7 *Chamboret v. Cagney*, 41 How. Pr. 125; 10 Abb. Pr. N. S. 31; 2 Sweeny, 378; *Lehmair v. Griswold*, 8 Jones & S. 100. See *Simkins v. Columbia etc. R. R. Co.* 20 S. C. 269.

8 *Glen etc. Manuf. Co. v. Hall*, 61 N. Y. 226. And see *Cornellus v. Kessel*, 58 Wis. 237.

§ 88. In action on contract.—In many of the States the term "counter-claim" embraces set-off, and in an action on contract the defendant may set up as a counter-claim any cause of action arising also on contract,

and existing at the commencement of the action.¹ In some of the States the term "set-off" is still preserved.² A test of the sufficiency of a counter-claim on contract is, whether the facts stated, if found in a complaint, would constitute a cause of action;³ for unless a counter-claim can be set up as a cause of action, it cannot be set up as a counter-claim.⁴ And it must be a complete cause of action existing in favor of the defendant where he asserts it;⁵ if the court would not have jurisdiction of an action upon it, it cannot be allowed.⁶ A claim barred by the Statute of Limitations is not available as a set-off or counter-claim.⁷ Being barred by the statute at the commencement of the action upon the principal claim, it does not constitute a cause of action existing at the commencement of the action upon which a counter-claim is maintainable.⁸ And items of a counter-claim accruing after the commencement of the action cannot be given in evidence by the defendant.⁹ Under the Iowa Code, a counter-claim barred by the Statute of Limitations may be pleaded, if it was the property of the party pleading it when it became barred, and if it was not barred when the claim sued on originated.¹⁰

1 See *Parsons v. Sutton*, 66 N. Y. 92; *Neal v. Lea*, 64 N. C. 568; *Cal. Code Civ. Proc.* § 438; *Barnes v. McMullins*, 78 Mo. 260; *Gannon v. Dougherty*, 41 Cal. 661.

2 See *Standley v. Mut. Life Ins. Co.* 85 Ind. 254, 262; § 85, *ante*.

3 *Vassear v. Livingston*, 4 Duer, 235; 13 N. Y. 248.

4 *Cragin v. Lovell*, 2 Civ. Proc. R. 123; 88 N. Y. 258.

5 *Cragin v. Lovell*, 2 Civ. Proc. R. 123; 88 N. Y. 258.

6 *Cragin v. Lovell*, 2 Civ. Proc. R. 123; 88 N. Y. 258.

7 *De Lavalette v. Wendt*, 75 N. Y. 579. And see *Van Allen v. Schermerhorn*, 14 How. Pr. 237; *Taylor v. Mayor*, 20 Hun, 292; 82 N. Y. 10.

8 *Lyon v. Petty*, Sup. Ct. Cal. 3 West C. Rep. 107. If not barred at the commencement of the action in which it is pleaded, it does not become so afterward, during the pendency of that action; *Brumble v. Brown*, 71 N. C. 513; *Stilwell v. Bertrand*, 22 Ark. 375; *Eve v. Louis*, 91 Ind. 457.

9 *Palge v. Carter*, Sup. Ct. Cal. 1 West C. Rep. 558; 64 Cal. 489.

10 *Folsom v. Winch*, Sup. Ct. Iowa, 19 N. W. Rep. 305; 63 Iowa, 477.

§ 89. In cases of tort.—Generally speaking, all independent express contracts, whether liquidated or unliquidated, are the subject of counter-claims in actions arising on contract.¹ But in an action on contract, a cause of action founded purely in tort, and not arising out of the transaction mentioned in the complaint or petition, cannot be set up as a counter-claim.² Thus, in an action on contract, it is not admissible to set up as a counter-claim that the plaintiff had fraudulently induced the defendant to pay moneys falsely claimed under the contract, in excess of the true value of the work.³ But a case of tort which the law permits the injured party to waive, and sue as on an implied contract, may be set up as a counter-claim in opposition to a recovery upon a contract.⁴ Thus, in a case of conversion, the party may elect to sue for the breach of the contract, or for the conversion, and if he elects to proceed for a breach of the contract, he may interpose it as a counter-claim, in an action upon contract brought against him by the one who had converted the property.⁵ So, if A breaks down B's fence, and turns his cattle in upon B's pasture land, B may waive the tort, and interpose a counter-claim for pasturage of the cattle, in an action of contract brought against him by A.⁶ So, it is held generally, that an action for money obtained by oppression, imposition, extortion, or deceit may be set off or counter-claimed in an action brought by the party against whom it exists.⁷ But a claim for damages for fraud and deceit, practiced in making and executing a contract of sale, cannot be interposed as a counter-claim, the plaintiff's action being upon a promissory note having no connection with the contract of sale.⁸ A judgment being a contract, the defendant may, in an action on contract, counter-claim a judgment obtained in an action for a tort.⁹ In an action for

a tort, a counter-claim to be available must arise out of the transaction set forth in the complaint or petition, as the foundation of the plaintiff's claim, or it must be connected with the subject of the action.¹⁰ The doctrine of the cases briefly stated is, that where the plaintiff's claim is founded on a contract, the defendant may set up any contract as a counter-claim, whether connected with the plaintiff's claim or not;¹¹ and he may set up as a counter-claim any claim arising out of the transaction set out in the complaint or petition, in his favor and against the plaintiff, whether the action arises out of a tort or a contract.¹²

1 Barnes v. McMullins, 87 Mo. 260, 274; Bitting v. Thaxton, 72 N. C. 541. And see §§ 85, 88, *ante*.

2 Bell v. Lesbini, 4 Civ. Proc. R. 367; Piser v. Stearns, 1 Hilt. 86; Chambers v. Lewis, 2 Hilt. 591; 11 Abb. Pr. 210; Devries v. Warren, 82 N. C. 356; Bell v. Lesbini, 66 How. Pr. 385; Trotter v. Commissioners, 90 N. C. 455. And see Clapp v. Wright, 21 Hun, 240; Shelly v. Vanarsdoll, 23 Ind. 543; Berry v. Carter, 19 Kan. 140.

3 Berrian v. Mayor, 15 Abb. Pr. N. S. 207.

4 Wood v. Mayor etc. 73 N. Y. 556; Bell v. Lesbini, 4 Civ. Proc. R. 367; Barnes v. McMullins, 87 Mo. 260; Brown v. Tuttle, 66 Barb. 169; Brady v. Brennan, 25 Minn. 210; City Nat. Bank v. Nat. Park Bank, 32 Hun, 105.

5 Colt v. Stewart, 50 N. Y. 17.

6 Norden v. Jones, 33 Wis. 600; 14 Am. Rep. 732

7 Harway v. Mayor etc. 1 Hun, 628; Stuart v. Atlantic Dredging Co. 1 N. Y. Month. Law Bull. 18.

8 Barnes v. McMullins, 87 Mo. 260

9 Taylor v. Root, 4 Keyes, 335.

10 Chamboret v. Cagney, 41 How. Pr. 125; 10 Abb. Pr. N. S. 31; 2 Sweeny, 378; Murden v. Priment, 1 Hilt. 75; Askins v. Hearn, 3 Abb. Pr. 184; Lehman v. Griswold, 8 Jones & S. 100; Edgerton v. Page, 18 How. Pr. 359; 10 Abb. Pr. 119; 20 N. Y. 281; Henry v. Henry, 27 How. Pr. 5; 17 Abb. Pr. 411; 3 Robt. 114; People v. Dennison, 84 N. Y. 272; 8 Abb. N. C. 129; 59 How. Pr. 157; Fishkill Sav. Inst. v. Nat. Bank, 19 Hun, 354; 80 N. Y. 162; McArthur v. Green Bay etc. Canal Co. 34 Wis. 139; Griffin v. Moore, 52 Ind. 295; Slone v. Slone, 2 Met. (Ky.) 339.

11 See Spencer v. Babcock, 23 Barb. 639; Lemon v. Trull, 13 How. Pr. 248; Parsons v. Sutton, 66 N. Y. 92; 7 Jones & S. 544; Sprout v. Crowley, 30 Wis. 187; Fanson v. Linsley, 20 Kan. 235; Stoddard v. Treadwell, 26 Cal. 234.

12 Bitting v. Thaxton, 72 N. C. 541. And see Devries v. Warren, 82 N. C. 356; Lasher v. Williamson, 55 N. Y. 619; Hoffa v. Hoffman, 33 Ind. 172; Tinsley v. Tinsley, 15 Mon. B. 469; Walsh v. Hall, 66 N. C.

233; *Chambers v. Frazier*, 29 Ohio St. 303; *Martin v. Pugh*, 23 Wis. 184; *McAdow v. Ross*, 53 Mo. 199, 205; *Ritchie v. Hayward*, 71 Mo. 560. Compare *Denniston v. Trimmer*, 27 Hun, 393; *Nash v. White's Bank*, 13 N. Y. Week. Dig. 141; *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372.

§ 90. *In actions for services, etc.*—In an action upon contract for services, the defendant may set up as a counter-claim damages sustained by him through the negligence of the plaintiff in the performance of the same contract of employment upon which the action is brought.¹ So, in such action by a mechanic, a claim for material converted by the plaintiff may be interposed as a counter-claim.² In an action against an attorney at law for moneys received by him as such, he may set up, by way of counter-claim, a demand in his favor against the plaintiff for services rendered.³ So, in an action to recover moneys received by the defendant, as agent, from the sale of goods, he may set up as a counter-claim the failure of the plaintiff to perform a contract to employ him as agent, for the sale of goods, at an agreed compensation.⁴ In an action to recover wages, damages caused by the plaintiff's quitting the service before the end of the term of employment may be interposed by way of counter-claim.⁵ And generally, in an action for breach of a contract, the defendant may counter-claim his damages arising from a breach of the contract on the part of the plaintiff.⁶

1 *Harlan v. St. Paul etc. Rallw. Co.* 31 Minn. 427. And see *Eaton v. Woolly*, 28 Wis. 628; *De Witt v. Cullings*, 32 Wis. 208; *Lancaster Manuf. Co. v. Colgate*, 12 Ohio St. 344.

2 *Wadley v. Davis*, 63 Barb. 500. So in an action against an employee for converting the employer's property, the former may set up a counter-claim for unpaid wages: *Biting v. Thaxton*, 72 N. C. 541.

3 *Gopen v. Crawford*, 53 How. Pr. 278.

4 *Grierson v. Mason*, 1 Hun, 113; 3 *Thomp. & C.* 185; 60 N. Y. 394. A cause of action for damages for breach of an agreement to employ is on contract, and may be properly set up as a counter-claim in an action founded on contract: *Denny v. Horton*, 3 N. Y. Civ. Proc. R. 255.

5 *Hunt v. Otis Company*, 4 Met. 464.

6 *Ives v. Van Epps*, 22 Wend. 155. And see *McAdow v. Ross*, 53 Mo. 199; *Moore v. Caruthers*, 17 Mon. B. 669; *Anderson Co. v. Stone*, 18 Mon. B. 852; *Escott v. White*, 10 Bush, 173.

§ 91. **Assault and battery.**—Where the defendant sets up, by way of counter-claim, an assault and battery committed upon him by the plaintiff prior to the one described in the complaint, it was held that the two occurrences were so independent of each other that they could not be disposed of in one action.¹ So, where the answer in an action for an assault set up as a counter-claim an alleged assault made by the plaintiff on the defendant, at the same time, it was held that although the two assaults arose in the same affray, they did not constitute one transaction, so as to authorize the latter to be set up as a counter-claim.² On the other hand, the defendant in an action for an assault and battery was permitted to set up in his answer a counter-claim, for damages for an alleged assault and battery at the same time and place, committed upon him by the plaintiff.³ The counter-claim was held to be proper, as arising out of the same transaction.⁴

1 Barhyte v. Hughes, 33 Barb. 320.

2 Schnaderbeck v. Worth, 8 Abb. Pr. 37. In a civil action for assault and battery, a libel published by the plaintiff concerning the defendant cannot be set up as a counter-claim: McDougall v. Maguire, 35 Cal. 274.

3 Slone v. Slone, 2 Met. (Ky.) 339.

4 Slone v. Slone, 2 Met. (Ky.) 339, 340.

§ 92. **In actions for divorce.**—It was formerly held in New York, that in an action for divorce on the ground of adultery, the defendant could not set up a counter-claim either for a separation or for a divorce by reason of the plaintiff's misconduct.¹ Nor in an action for a limited divorce on the ground of cruelty could the defendant set up as a defense or counter-claim the adultery of the plaintiff.² But it is now held, that in an action for divorce *a vinculo*, a defendant may have affirmative relief.³ And where, in such action, he sets up the adultery of the plaintiff, the court may grant him a

divorce although he is a non-resident.⁴ So the defendant in such action may set up as a counter-claim both adultery and cruelty.⁵

1 *R. F. H. v. S. H.*, 40 Barb. 9; *Terhune v. Terhune*, 40 How. Pr. 258; *Diddell v. Diddell*, 3 Abb. Pr. 167.

2 *Henry v. Henry*, 17 Abb. Pr. 411; 27 How. Pr. 5; 3 Robt. 614.

3 *Finn v. Finn*, 62 How. Pr. 83. And see *Anon.*, 17 Abb. Pr. 48; *Lealle v. Lealle*, 11 Abb. Pr. N. S. 311.

4 *Fullmer v. Fullmer*, 6 N. Y. Week. Dig. 22, 42.

5 *Spahn v. Spahn*, 12 Abb. N. C. 168.

§ 93. **In foreclosure cases.**—In an action by a mortgagee against the mortgagor, upon a note and mortgage given for the purchase money of the premises, the mortgagor may set up a counter-claim for damages by reason of the fraud of the mortgagee, in concealing from him material facts as to the situation and extent of the premises.¹ So in an action on mortgage notes, after foreclosure of the mortgaged premises, the defendant answered, setting up the invalidity of the proceedings to foreclose the mortgage, and a prayer to redeem from the same, and the matter thus stated was held to constitute a valid counter-claim.² In an action to foreclose a mortgage given to secure the purchase money, on a purchase of the business and good will of a firm, breach of the contract of sale by injury to the good will may properly be set up by way of counter-claim.³ An action to foreclose a mortgage, wherein judgment is asked for a deficiency, is one in which a counter-claim may be interposed.⁴ And in an action by a mortgagee, after sale on foreclosure, to recover a deficiency, the mortgagor may allege, by way of counter-claim, damages sustained by him on account of waste committed by the mortgagee in possession between the decree and sale.⁵

1 *Pierce v. Tiersch*, 40 Ohio St. 168; *Allen v. Shackelton*, 15 Ohio St. 145.

2 *Fouts v. Mann*, 15 Neb. 172. And see *Bernheimer v. Willis*, 11 Hun, 16.

3 *Burckhardt v. Burckhardt*, 36 Ohio St. 261. See further, as to the right to counter-claim damages arising from breach of contract entered into between the parties at the time of the execution of the mortgage: *Sanford v. Travers*, 40 N. Y. 140; 7 Bosw. 498; *Seligman v. Dudley*, 14 Hun, 186.

4 *Hunt v. Chapman*, 51 N. Y. 555; *Bathgate v. Haskin*, 63 N. Y. 261; 59 N. Y. 533. Compare *Agate v. King*, 17 Abb. Fr. 159; *Nat. Ins. Co. v. McKay*, 21 N. Y. 191.

5 *Smith v. Fife*, 2 Neb. 10. It seems that a demand in an answer in foreclosure, that the bond and mortgage sued on be adjudged void for usury, is not a counter-claim which is admitted by failure to reply: *Barthet v. Elias*, 2 Abb. N. C. 364. A purchaser of land subject to a mortgage cannot, in a suit to foreclose, set up as a counter-claim a fraud practiced upon him by the mortgagor after the mortgage was given, where there is nothing to connect the plaintiff with such fraud: *Reed v. Latson*, 15 Barb. 9. An answer in foreclosure, alleging the invalidity of the mortgage in suit, and title to the premises under a subsequent mortgage, is not a counter-claim, but an equitable defense: *Caryl v. Williams*, 7 Lans. 416. In an action to foreclose a mortgage upon land, a sum of money due the defendant from the plaintiff is a valid counter-claim: *Richmond v. Lattin*, 64 Cal. 273.

§ 94. **Between landlord and tenant.**—A cause of action in a tenant against his landlord, for wrongfully interfering with his enjoyment of the premises rented, is a valid counter-claim in an action against him by the landlord to recover rent.¹ In an action for rent, the defendant may counter-claim damages arising from breaches of covenants in the lease,² as, for instance, a breach of the landlord's covenant to repair;³ and under such a covenant, the defendant may counter-claim an amount expended by him in the necessary repair of the premises, and also damages for the loss of use of parts of the premises rendered untenable for want of repair.⁴ And the fact that the covenant to pay rent and the covenant to repair were separate and independent covenants, constitutes no objection to the right of the defendant to recoup.⁵ The defendant in an action for rent may counter-claim damages sustained by reason of fraud on the part of the plaintiff.⁶ So, on the other hand, in an action by a tenant to annul a lease for fraud, the landlord may interpose a counter-claim for rent which has accrued under the lease.⁷ Damages from an unlawful eviction may, it seems, be

set up by way of counter-claim in an action against a tenant for rent which had accrued before such eviction.⁸ But injury to a tenant in consequence of a change of grade in a street cannot, in the absence of any covenant in the lease, protecting him from such injury, be set up as a counter-claim in an action to recover rent.⁹ A summary proceeding against a tenant for an unlawful detainer is not a proper case for a counter-claim.¹⁰

1 *Goebel v. Hough*, 26 Minn. 252. And see *Blair v. Claxton*, 18 N. Y. 529; *Morgan v. Smith*, 5 Hun, 220; *Tinsley v. Tinsley*, 15 Mon. B. 458. Compare *Levy v. Bond*, 1 Smith, E. D. 169; *Gager v. Small*, 19 Alb. L. J. 400; *Edgerton v. Page*, 20 N. Y. 281; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *De Witt v. Pierson*, 112 Mass. 8; 17 Am. Rep. 58; *Bartlett v. Farrington*, 120 Mass. 284. Where the lessor permitted rooms above those occupied by the lessee as a lawyer's office to be used for the business of printing, which disturbed the lessee and compelled him sometimes to leave his office, and broke the ceilings, and damaged his furniture and books by leakage, but he did not surrender possession, it was held that he could not counter-claim the damage in an action for the rent: *Boreel v. Lawton*, 90 N. Y. 233; 43 Am. Rep. 170.

2 *Orton v. Noonan*, 30 Wis. 611; *Coleman v. Bunce*, 37 Tex. 171; *Hay v. Short*, 49 Mo. 139; *Walker v. Shoemaker*, 4 Hun, 579; *Cook v. Soule*, 56 N. Y. 420; *Mayor v. Mable*, 13 N. Y. 151; *Commonw. v. Todd*, 9 Bush, 708.

3 *Coleman v. Bunce*, 37 Tex. 171; *Block v. Ebner*, 54 Ind. 544; *Cook v. Soule*, 45 How. Pr. 340; 56 N. Y. 420; *Fox v. Abbott*, 16 N. Y. Week. Dig. 159.

4 *Myers v. Burns*, 33 Barb. 401; 35 N. Y. 269.

5 *Green v. Bell*, 3 Mo. App. 291.

6 *Staples v. Anderson*, 3 Robt. 327. Compare *Whitney v. Allaire*, 1 N. Y. 305; *Mayor etc. v. Wood*, 4 Abb. Pr. N. S. 332; *Van De Sande v. Hall*, 13 How. Pr. 458; *Norris v. Tharp*, 65 Ind. 47.

7 *Wood v. Mayor etc.* 3 Abb. Pr. N. S. 467; 4 Abb. Pr. N. S. 332. Where lessors sued lessees for rent, it was held that the latter were entitled to set up as a counter-claim that the lessors had no right to make the lease of the land, and that the real owners thereof had brought suit against one of the lessees, and would recover damages for its use during such lease: *McKesson v. Mendenhall*, 64 N. C. 236.

8 *La Farge v. Halsey*, 4 Abb. Pr. 377; 1 Bosw. 171.

9 *Gallup v. Albany Railway Co.* 65 N. Y. 1.

10 *Kelly v. Teague*, 63 Cal. 68.

§ 95. In action for goods sold.—In an action to recover the price of goods sold, or on a note given therefor, it is competent for the defendant to set up as a counter-claim any damages he may have sustained by fraud in the

sale, or by breach of warranty.¹ And a counter-claim of damages for a breach of warranty in the quality of other goods may be set up in such action, as the counter-claim arises out of contract and not out of tort.² In an action on notes given in part payment for a farm, damages sustained by the defendant by reason of fraudulent representations as to the quantity of land sold may be set up by way of counter-claim.³ So in an action on contract for goods sold, the defendant may set up by way of counter-claim, a judgment recovered by him against the plaintiff before the suit brought by the latter was commenced.⁴ So in an action to compel the delivery of goods, a claim on the part of a defendant, for the price and value of the identical goods which are the subject of the action, is strictly a counter-claim, and may be interposed as such.⁵ In an action for the price of goods sold, a counter-claim for damages for failure to deliver, which shows that delivery and payment were concurrent conditions, must also aver an offer or readiness to pay, otherwise it does not state facts sufficient to constitute a counter-claim.⁶ A claim for commissions, freight, cartage, storage, and advertising is a valid counter-claim in an action to recover the proceeds of goods consigned to the defendant for sale.⁷

1 *Timmons v. Dunn*, 4 Ohio St. 690; *Howie v. Rea*, 70 N. C. 559; *Cox v. Long*, 69 N. C. 7; *Hoffa v. Hoffman*, 33 Ind. 172; *Litchhult v. Treadwell*, 74 N. Y. 603; *Dounce v. Dow*, 57 N. Y. 16. And see *Kelly v. Bernhelmer*, 3 Thomp. & C. 140; *Upton v. Julian*, 7 Ohio St. 95; *Bruce v. Burr*, 5 Daly, 510; 67 N. Y. 237; *Love v. Oldham*, 22 Ind. 51.

2 *Brooklyn Sugar Ref. Co. v. Earle*, 1 Month. Law Bull. 46. A claim for damages for a violation of a covenant to ship goods in good cases may be counter-claimed in an action for the price of other goods sold to the defendant: *Wheelock v. Pacific Co.* 51 Cal. 224.

3 *Isham v. Davidson*, 52 N. Y. 237. And see *Walsh v. Hall*, 66 N. C. 233.

4 *Wells v. Henshaw*, 3 Bosw. 625; *Clark v. Story*, 29 Barb. 295.

5 *Thompson v. Kessel*, 30 N. Y. 333. Compare *McDonald v. Christie*, 42 Barb. 38.

6 *Chambers v. Frazier*, 29 Ohio St. 362.

7 *Crocker v. Fairbanks*, 16 N. Y. Week. Dig. 235.

§ 96. In actions relating to real property.—In ejectment, the subject of the action is the land in controversy, and facts showing that the equitable title is in the defendant, and that the plaintiff's legal title was wrongfully obtained and should inure to the defendant, are pleadable as a counter-claim.¹ In an action by a vendor of land for possession against his vendee, who has been let into possession, the title being reserved, the latter may set up the contract of sale, and ask for an account of the payments upon the purchase money, by counter-claim in the same action.² Where the vendee of land refused to complete the purchase, and the vendor sold the land to another, it was held, in an action to recover damages for the breach of contract, that the defendant could maintain a counter-claim for any sums he had paid as a part of the purchase money at the time of the execution of the contract.³ So if a vendee relying upon a parol contract to convey land pays the purchase money and makes improvements, he cannot be ousted until the vendor repays the purchase money and makes compensation for the value of the improvements; and these facts constitute a valid equitable counter-claim in an action by the vendor to recover possession of the land.⁴ In an action to set aside a second deed as a cloud upon the plaintiff's title to land, such second deed being the first recorded, the defendant may allege and prove as a counter-claim that the plaintiff's deed was fraudulently procured, and ask to have it set aside.⁵ In a suit for the possession of lands and to quiet title, the defendant may, by way of counter-claim, set up a title in equity in himself, and pray to have his title quieted.⁶ In an action for partition, the respective claims and rights of the parties may be put in issue and determined, and for that purpose a counter-claim may be filed.⁷ In an action for the possession of land, founded

upon the legal title held by the plaintiff, the defendant may set up as a counter-claim that he is equitably the owner of the land, and demand a specific performance or conveyance.⁸ So in an action to restrain waste, and for the recovery of damages for waste already done to the freehold, the defendant may, by way of counter-claim, demand the specific performance of a contract to convey.⁹ In a suit by the grantor to cancel a conveyance of land for fraud, a counter-claim denying the fraud, and alleging that the plaintiff has wrongfully kept the defendant out of possession, and asking judgment for possession and for rents and profits, is admissible;¹⁰ but a demand of damages for waste is not incident to the recovery of possession of the land, and cannot properly be joined in such counter-claim.¹¹ And a counter-claim for damages sustained by waste on land without the State cannot be allowed.¹² A widow's claim for dower is not subject to a set-off for damages, nor for moneys due, nor for the receipt of rents and profits of the whole of the lands in which she claims dower, nor in an action for dower in which she claims no damages for its detention, can such set-off be interposed as a counter-claim.¹³

1 *Cornellius v. Kessel*, 58 Wis. 237. Equitable counter-claim of the defendant is sufficient to defeat an action of ejectment: *Bodenhamer v. Welch*, 89 N. C. 78; *Farmer v. Daniel*, 82 N. C. 152; *Stith v. Lookabill*, 76 N. C. 465.

2 *Pearsall v. Mayers*, 64 N. C. 549. See also *Cavalli v. Allen*, 57 N. Y. 508.

3 *Hening v. Punnett*, 4 Daly, 543.

4 *Daniel v. Crumpler*, 75 N. C. 184. See *Reed v. Newton*, 22 Minn. 541. In an action to recover a balance of purchase money claimed to be due for land sold, the defendant may counter-claim damages for the non-delivery of possession at the time agreed, and for the removal of certain fixtures which, by the terms of the agreement, were purchased with the property: *Fettretch v. McKay*, 47 N. Y. 428.

5 *Moody v. Moody*, 16 Hun, 189.

6 *Barnes v. Union School Township*, 91 Ind. 301; *McManus v. Smith*, 53 Ind. 211.

7 *Ferris v. Reed*, 87 Ind. 123. See *Clayton v. Blough*, 93 Ind. 85.

8 *Crary v. Goodman*, 12 N. Y. 266; *Cavalli v. Allen*, 57 N. Y. 506.

9 *Lazarus v. Hellman*, 11 Abb. N. C. 93; 2 Civ. Proc. R. 204. In an action for purchase money, the defendant may set up as a counter-claim a breach of the covenant of seisin: *Scantlin v. Allison*, 12 Kan. 85. And see *Lowry v. Hurd*, 7 Minn. 356. An express verbal contract for the sale of land, being void under the statute of frauds, cannot be pleaded by way of counter-claim: *Ryan v. Dunphy*, 4 Mont. 342.

10 *Woodruff v. Garner*, 27 Ind. 4.

11 *Woodruff v. Garner*, 27 Ind. 4. See *Devries v. Warren*, 82 N. C. 356.

12 *Cragin v. Lovell*, 88 N. Y. 258; 2 Civ. Proc. R. 123.

13 *Bogardus v. Parker*, 7 How. Pr. 303. See *Elliott v. Gibbons*, 31 N. Y. 67; 30 Barb. 498; *Hill v. Golden*, 16 Mon. B. 554.

§ 97. In particular cases.—A covenant not to sue the defendant may be made available by the latter, by way of counter-claim, to defeat an action brought in violation thereof.¹ In an action for breach of a contract of sale, the defendant may set up a rescission of the contract on the ground of fraud or mistake, and also breach of warranty on the part of the plaintiff.² In an action to restrain the use of a trade-mark, a counter-claim on the part of the defendant that he was the owner of it, and asking an injunction against the plaintiff's use thereof, is proper, because it is connected with the subject of the action set forth in the complaint.³ So in an action on a promissory note, for the payment of which collateral security was given in the shape of a pledge, deposited with the payee, a conversion of the pledge can be interposed as a counter-claim, because the rights of action spring out of a single transaction.⁴ A counter-claim to a claim for freight can be sustained for loss occasioned to goods by delay arising from the wrongful act of the carrier.⁵ So a counter-claim for damages caused by improper delay may be interposed in the carrier's action to recover damages for injuries done to his vessel by owners of freight.⁶ In an action against a hotel or boarding-house keeper for the loss of goods, upon his liability as bailee of the

guest's property, the defendant may set up as a counter-claim the plaintiff's indebtedness to him for board.⁷ In an action to recover upon a promissory note, the defendant may set up, by way of counter-claim, damages sustained by reason of a breach of a fraudulent warranty of consideration.⁸ And if a note is given for property sold, and the vendee does not offer to return it, the defense of breach of warranty and of fraud can only be urged by way of counter-claim, and not as an absolute bar of the right of action.⁹ If a party is induced by fraud to overpay on a deficiency in quantity, he may counter-claim the amount so overpaid.¹⁰ And it is held, that the right to recover money lost in betting may be set up as a counter-claim.¹¹ A vendee who is induced to purchase land through the fraudulent representations of the vendor may counter-claim the damages accruing to him thereby, in an action by the vendor for the purchase money.¹² In an action upon contract for goods sold and delivered, the defendant may set up as a counter-claim a judgment recovered by him against the plaintiff before the suit brought by the latter was commenced.¹³ It is held in Iowa, that where an action is brought on a judgment recovered in another State, a cause of action which accrued before the judgment was obtained, and which might have been pleaded as a set-off in the other State, may be pleaded as a counter-claim in such action on the judgment.¹⁴ Where a party seeks to have an instrument, which is a deed upon its face, declared to be a mortgage, claiming that it was given to secure certain undetermined demands and expected advances, and asks for an accounting to determine their amount, the defendant may set up these demands and advances as counter-claims, and demand judgment thereon.¹⁵

- 1 *Harshaw v. Woodfin*, 64 N. C. 568.
- 2 *Bruce v. Burr*, 5 Daly, 510; 67 N. Y. 237.
- 3 *Glen etc. Manuf. Co. v. Hall*, 61 N. Y. 226.
- 4 *Cass v. Higenbotham*, 15 N. Y. Week. Dig. 135.
- 5 *Elwell v. Skiddy*, 77 N. Y. 282; 8 Hun, 73.
- 6 *Starbird v. Barrons*, 43 N. Y. 200.
- 7 *Harris v. Curet*, 9 Abb. Pr. N. S. 130. And see *Griffin v. Moore*, 52 Ind. 295.
- 8 *Brown v. Tuttle*, 66 Barb. 163. See *Nichols v. Boerum*, 6 Abb. Pr. 290; *Warren v. Van Pelt*, 4 Smith, E. D. 202; *Sigler v. Hidy*, 56 Iowa, 504.
- 9 *Hopkins v. Lane*, 2 Hun, 38; 64 N. Y. 204. See *Isam v. Davidson*, 52 N. Y. 237; *Litchhult v. Treadwell*, 74 N. Y. 603. In a suit in equity for the cancellation of a policy of insurance, the defendant may set up, by way of counter-claim, a cause of action on the policy for loss of the property insured: *Revere Fire Ins. Co. v. Chamberlin*, 56 Iowa, 506.
- 10 *Betz v. Peter*, 3 N. Y. Week. Dig. 517.
- 11 *McDougall v. Walling*, 43 Barb. 364; 51 N. Y. 666.
- 12 *Coe v. Lindley*, 32 Iowa, 437.
- 13 *Wells v. Henshaw*, 3 Bosw. 625. And see *Clark v. Story*, 29 Barb. 295; *Read v. Jeffries*, 16 Kan. 534; *Stevens v. Able*, 15 Kan. 584.
- 14 *Folsom v. Winch*, 63 Iowa, 477. And see *Rankin v. Barnes*, 5 Bush, 20.
- 15 *Bucking v. Hauselt*, 6 N. Y. Week. Dig. 412. So in an action upon a note given for a supposed balance due on settlement, the court will open the settlement, and allow the defendant to show the mistake in the account, by way of counter-claim: *Garrett v. Love*, 80 N. C. 205.

§ 98. In what cases not pleadable. — Usury is not ordinarily a proper subject of counter-claim.¹ And it is held, that neither usury nor payment can be pleaded as a counter-claim to an action by an assignee of a note.² In an action for conversion, a cause of action arising upon a contract is not proper as a counter-claim;³ nor in such action can the defendant set up, by way of counter-claim, a cause of action for the conversion of certain other property.⁴ So, as a general rule, matters in tort cannot be set up as a counter-claim in an action on contract;⁵ but an exception to the rule exists in a case of tort, which may be waived.⁶ In an action for work and labor performed, a counter-claim for failing and refusing to abide by award of arbitrators is not

good.⁷ In an action on a contract, a claim for the use and occupation of lands held by the plaintiff adversely to the defendant cannot be set up as a counter-claim.⁸ A claim for money loaned to a plaintiff, as overseer of the poor, cannot be set up as a counter-claim in an action to recover a penalty for violation of the excise law.⁹ So a right to the specific performance of an agreement to issue a paid-up policy of life insurance, cannot be made the ground of a counter-claim to a suit by the insurance company to foreclose a mortgage executed to secure a loan of money.¹⁰ So a demand originating in contract cannot be pleaded as a counter-claim in an action for the recovery of a specific chattel.¹¹ In an action to recover the purchase money on breach of contract to convey, a subsequent depreciation in the value of the land cannot be pleaded as a counter-claim.¹² And in an action to recover money alleged to have been obtained from the plaintiff by duress of imprisonment, upon a void warrant, for fornication with the defendant's daughter, and by threats of further prosecution for the same, the defendant cannot set up, by way of counter-claim, the debauching of his daughter and getting her with child, by which he had lost her services, etc.¹³ So in an action for work and labor, the defendant, by leave of court, filed a cross-complaint for damages from an excessive attachment levy on the defendant's property in the same action, and it was held that such matter constituted no defense or counter-claim, or matter of cross-complaint to the plaintiff's action.¹⁴

1 See *Equitable Life Assur. Soc. v Cuyler*, 12 Hun, 247; 75 N. Y. 511; *National Bank v. Lewis*, 81 N. Y. 15; *Farmers' etc. Nat. Bank v. Lang*, 22 Hun, 372; *Stephens v. Monongahela Bank*, 4 Colo. L. R. 664; 4 Sup. Ct. Rep. 336; *Peterborough Bank v. Childs*, 133 Mass. 248; 43 Am. Rep. 509; *Lebanon Bank v. Karmany*, 98 Pa. St. 65. But compare *Martin v. Pugh*, 23 Wis. 184.

2 *True v. Triplett*, 4 Met. (Ky.) 58. And see *Bledsoe v. Rader*, 30 Ind. 354; *Burke v. Thorn*, 44 Barb. 363; *Belleau v. Thompson*, 33 Cal. 495; *Wagener v. Murs*, 20 S. C. 533.

3 *Chambers v. Lewis*, 2 Hilt. 591; 10 Abb. Pr. 206; 11 Abb. Pr. 210; *Illingworth v. Greenleaf*, 11 Minn. 245.

4 *Askins v. Hearn*, 3 Abb. Pr. 184. And see *Allen v. Coates*, 29 Minn. 46; *Schmidt v. Bickenbach*, 29 Minn. 122.

5 *Shelly v. Vanarsdoll*, 23 Ind. 543; *Lovejoy v. Robinson*, 8 Ind. 399; *Collier v. Ervin*, 3 Mont. 142; *Bell v. Lesbini*, 66 How. Pr. 385. And see *De Leyer v. Michaels*, 5 Abb. Pr. 203.

6 *Brady v. Brennan*, 25 Minn. 222; *Bryce v. Parker*, 11 S. C. 337. And see § 83, *ante*.

7 *McMahan v. Spinning*, 51 Ind. 187. See *Curtis v. Barnes*, 30 Barb. 225.

8 *Folsom v. Carl*, 6 Minn. 420. And see *Quinn v. Smith*, 49 Cal. 163. A balance due from a tenant for rent is not a proper subject of counter-claim, in an action by the tenant against the landlord for entering on the land, and seizing and carrying away the crop: *Sharp v. Kinsman*, 18 S. C. 108.

9 *Denniston v. Trimmer*, 27 Hun, 393; 15 N. Y. Week. Dig. 312.

10 *Standley v. Northw. Mut. Life Ins. Co.* 95 Ind. 254.

11 *Williams v. Irby*, 15 S. C. 458. But a counter-claim is held to be admissible where the action is upon a contract, although a lien on property is involved: *Poston v. Rose*, 87 N. C. 279.

12 *Shryer v. Morgan*, 77 Ind. 479.

13 *Heckman v. Swartz*, 55 Wis. 173. In an action against a railroad company for killing the plaintiff's cattle, the defendant cannot interpose a counter-claim for injury done to its engine: *Simkins v. Railroad Co.* 20 S. C. 258.

14 *Jeffreys v. Hancock*, 57 Cal. 646. The right of a defendant in an action of claim and delivery to a return of the property replevied, and to damages for the taking and detention of the same in such action, is not a cause of action which can constitute a counter-claim in such action of claim and delivery: *Slyte v. Nelson*, 26 Minn. 105; *De Leyer v. Michaels*, 5 Abb. Pr. 203. Compare *Brown v. Buckingham*, 11 Abb. Pr. 387; 21 How. Pr. 190. A defendant cannot plead the same counter-claim to three independent actions brought by the same plaintiff: *Tuckerman v. Corbin*, 66 How. Pr. 404.

§ 99. *Claims in different rights.*—A counter-claim to be valid must always be founded on an existing demand *in præsenti*, and not one that may be claimed *in futuro*.¹ The demands must be mutual, and co-exist as separate causes of action at the commencement of the action upon the principal demand.² And until a demand becomes mature a counter-claim may be defeated by the assignment by the opposite party of his claim, though the latter be insolvent, and his demand has not become payable when assigned.³ Promissory notes assigned before maturity may be pleaded as a counter-claim by the assignee, if there is an existing cause of

action upon them at the commencement of the plaintiff's action.⁴ But if assigned after maturity, the assignee takes them subject to all existing equities between the maker and payees, and under such circumstances they would not be the subject of a counter-claim, and as such could not be pleaded.⁵ In an action by an assignee upon a chose in action, not negotiable, if the defendant seeks to set off a claim in his own favor, he must prove that the claim belonged to him before notice of the assignment.⁶ In an action by an executor, upon a demand which arose after the death of the testator, the defendant cannot set off a demand against the testator, although it existed at the time of his death.⁷ In an action by executors for the price of property of their testator sold by them, the defendant cannot avail himself, by way of counter-claim, of false and fraudulent representations made by the executors in the sale of the property, and his remedy, if any, is against the executors personally.⁸ But in an action by an executor, upon a demand due his testator, false and fraudulent representations made by the latter, in the sale out of which the demand arose, constitute a valid counter-claim.⁹ So if one who is indebted to an estate in the hands of a receiver, executor, or trustee is employed to render necessary services for the benefit and protection of the estate, the value of his services is a proper counter-claim in an action to recover the debt.¹⁰ One sued as a personal representative cannot purchase a claim against a creditor of the estate subsequently to the death of the deceased, and avail himself of it as a counter-claim.¹¹ In an action by an administrator to recover a debt due the intestate in his lifetime, the defendant cannot counter-claim his share of the estate as next of kin.¹² A debt due to a defendant as guardian cannot be counter-claimed against a demand

owing from him individually.¹³ Nor has a receiver the right to retain funds collected by him, and set off his own individual claims against the party to whom the funds are directed to be paid.¹⁴ But an executor may set off against a claim made for a legacy a debt due the estate from the legatee, even though the debt is barred by the Statute of Limitations.¹⁵ A surrogate has no power to allow a set-off in favor of an individual, who as executor is directed to pay over money to his own debtor.¹⁶ In an action on an injunction bond by the assignee of the obligee, promissory notes given by the latter, and also a judgment against him, may be properly pleaded by the defendant as counter-claims.¹⁷

1 *Martin v. Kunzmüller*, 10 Bosw. 16; 37 N. Y. 396; 4 Trans. App. 464.

2 *Lyon v. Petty*, Sup. Ct. Cal. 3 West C. Rep. 107. And see *Ramsey v. Robinson*, 58 Iowa, 225; *Zuck v. McClure*, 63 Pa. St. 541; *Taylor v. New York*, 82 N. Y. 10.

3 *Myers v. Davis*, 22 N. Y. 489. See *Lowell v. Lane*, 53 Barb. 222; *Kelsey v. Bradbury*, 21 Barb. 531; N. Y. Code Civ. Proc. § 592.

4 *Lyon v. Petty*, Sup. Ct. Cal. 3 West C. Rep. 107.

5 *Lyon v. Petty*, Sup. Ct. Cal. 3 West C. Rep. 107; *Barnes v. McMullins*, 78 Mo. 280. And see *Sherwood v. Barton*, 30 Barb. 231; 23 How. Pr. 533; *Ferreira v. Depew*, 4 Abb. Pr. 131. Compare *Cutler v. Cook*, 77 Mo. 383; *Weeks v. Prior*, 27 Barb. 79; *Kastner v. Pibilinski*, 96 Ind. 229.

6 *Solomon v. Holt*, 3 Smith, E. D. 139. See *Downing v. Gibson*, 53 Iowa, 517; *Cummings v. Morris*, 3 Bosw. 560; 25 N. Y. 625; *Van Valen v. Lapham*, 13 How. Pr. 240; 5 Duer, 630; *Filkin v. Ferris*, 18 Barb. 531. In an action by an assignee of a chose in action to which the defendant is entitled to a set-off under the statute, the latter is not entitled to an affirmative judgment for a balance due him thereon, as upon a counter-claim against the plaintiff: *Webb v. Michener*, 22 Minn. 48.

7 *Merritt v. Seaman*, 6 N. Y. 168; 6 Barb. 130. And see *Fry v. Evans*, 8 Wend. 530; *Root v. Taylor*, 20 Johns. 137; *Jordon v. National etc. Bank*, 12 Hun, 512; 74 N. Y. 467. Compare *Davis v. Stover*, 16 Abb. Pr. N. S. 225.

8 *Westfall v. Dungan*, 14 Ohio St. 276.

9 *Isham v. Davidson*, 52 N. Y. 237.

10 *Davis v. Stover*, 53 N. Y. 473. But see *L'Engle v. L'Engle*, 19 Fla. 714. A claim for funeral expenses may be pleaded as a set-off in a suit by the personal representative for a debt due the intestate: *Barbee v. Green*, 86 N. C. 153.

11 *McClenahan v. Cotten*, 83 N. C. 332.

12 *Woodhouse v. Woodhouse*, 11 N. Y. Week. Dig. 241.

13 *Gansner v. Franks*, 75 Mo. 64. And see *Dobyns v. Rawley*, 76 Va. 537.

14 *Johnson v. Gunter*, 6 Bush, 534.

15 *Re Bogart*, 28 Hun, 463. And see *Barlow v. Myers*, 21 Hun, 236.

16 *Matter of Livingston*, 27 Hun, 607. And see *Stillwell v. Carpenter*, 53 N. Y. 414.

17 *Miller v. Centerville*, 57 Iowa, 640.

§ 100. Defendant not bound to set up.—A defendant may set forth in his answer as many defenses and counter-claims as he may have,¹ and the objection of inconsistency between them is not available.² But he is not obliged to set up his counter-claim, and may elect to enforce its recovery in a separate suit.³ And this is so even in an action in which an attachment is granted;⁴ and although judgment should go against the defendant in such action, it would be no answer to a subsequent action by him on the counter-claim.⁵ But if the defendant does plead a counter-claim, he cannot during the pendency of that action have a separate action upon it.⁶ And if a counter-claim is used for any purpose in an action, it is conclusive upon the right to bring an action thereafter upon it, although no affirmative relief was demanded upon it in the action in which it was employed.⁷ Nor can a counter-claim be made the subject of an independent action when it results from an alleged contract, the existence of which, in many of its material parts, is directly negatived by a judgment unreversed and unappealed from, given in an action between the same parties.⁸ But the fact that a demand was set up as a counter-claim in one action, and properly excluded, does not prevent it from being made the subject of an independent action, or from being set up as a counter-claim in another action.⁹ But a cause of action existing in favor of one partner for damages for breach of co-partnership articles, which has been set up as a counter-claim in an action by one of the partners for an

accounting, cannot properly be made the subject-matter of a subsequent suit for damages against the other partners.¹⁰ The right of set-off is one which may be waived by the party entitled to it, and where such party by an agreement deliberately made upon good consideration contracts to waive it, he is estopped from thereafter asserting the right.¹¹ But a mere omission to assert a cross-claim when a demand is presented for payment does not involve a waiver of the counter-claim.¹² Under the California Code, if the defendant omits to set up a counter-claim, arising out of the transaction set out in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the plaintiff's cause of action, neither he nor his assignee can afterward maintain an action thereon.¹³ And in a few of the States, if the defendant omits to set up his counter-claim or set-off, he cannot in a subsequent action thereon recover costs.¹⁴

1 See N. Y. Code Civ. Proc. § 507; Cal. Code Civ. Proc. § 441.

2 *Bruce v. Burr*, 5 Daly, 510; 67 N. Y. 257. And see *May v. Burk*, 80 Mo. 675.

3 *Welch v. Hazelton*, 14 How. Pr. 97; *Lignot v. Redding*, 4 Smith, E. D. 285; *Halsey v. Carter*, 1 Duer, 667; *Morgan v. Powers*, 66 Barb. 35; *Inslee v. Hampton*, 8 Hun, 230; *Hobbs v. Duff*, 23 Cal. 629; *Stoddard v. Treadwell*, 26 Cal. 306; *Francis v. Edwards*, 77 N. C. 275; *Woody v. Jordon*, 63 N. C. 139.

4 *Ruppert v. Haug*, 24 Hun, 382; 1 Civ. Proc. R. 411; 87 N. Y. 141.

5 *Brown v. Gallandet*, 80 N. Y. 417; *Ruppert v. Haug*, 24 Hun, 382; 1 Civ. Proc. R. 411; 87 N. Y. 141.

6 *Woody v. Jordon*, 63 N. C. 189, 197. See *Harris v. Hammond*, 18 How. Pr. 123; *Wiltse v. Northam*, 3 Bosw. 162; *Fabricotte v. Launitz*, 3 Sand. 743.

7 *Davidson v. Alfaro*, 6 N. Y. Week. Dig. 455. And see *Inslee v. Hampton*, 11 Hun, 156; *Jones v. Magee*, 7 N. Y. Week. Dig. 97; *Hatch v. Benton*, 6 Barb. 28.

8 *Nemetty v. Naylor*, 63 How. Pr. 387.

9 *Ives v. Goddard*, 1 Hill, 434. And see *People v. Dennison*, 59 How. Pr. 157; 3 Abb. Pr. N. C. 123; 81 N. Y. 272.

10 *Costa v. Llorens*, 10 N. Y. Week. Dig. 461.

11 *Gutchess v. Daniels*, 49 N. Y. 605.

12 *Stoddard v. Treadwell*, 26 Cal. 294; *Folsom v. Winch*, 63 Iowa, 477. Where a counter-claim is duly pleaded, neither party has the right to go out of court before a complete determination of all the

matters in controversy, without or against the consent of the other: *Francis v. Edwards*, 77 N. C. 271. And see *Gwathney v. Cheatham*, 21 Hun, 578; *Geenia v. Keah*, 66 Barb. 245; *Whitman v. Horton*, 14 Jones & S. 531; *Sigler v. Hidy*, 56 Iowa, 504. Compare *Bowen v. Pickett*, 26 Kan. 219.

13 Cal. Code Civ. Proc. § 439.

14 Neb. Code Civ. Proc. § 192; Ohio Code Civ. Proc. § 95; Kan. Code Civ. Proc. § 96. See *Terry v. Shively*, 93 Ind. 413.

§ 101. **How pleaded.**—Matter constituting a counter-claim should be specially pleaded.¹ It must be stated specifically, and with clearness as to detail, that the demand is a counter-claim.² And no averment in an answer will be held to constitute a counter-claim, unless it is so denominated, and the appropriate relief prayed.³ So an answer which assumes to set up a counter-claim, or a cause of action for affirmative relief, should state all the facts necessary to constitute such counter-claim or affirmative relief, as fully and specifically as if the defendant were filing a complaint or petition in an original action.⁴ If it omits any essential element of a cause of action it is bad.⁵ It is not, however, essential that a separate count in an answer, setting forth a counter-claim, should contain in itself all the allegations requisite to a perfect counter-claim; it may refer to other parts of the answer, or to the complaint, and the matters thus referred to are to be considered a part of the count as if written at length therein.⁶ So if the facts are sufficiently stated, it has been held to be immaterial whether the defendant calls his pleading a defense or a counter-claim.⁷ But when a party defines and characterizes his answer as a defense, and it is uncertain whether a counter-claim is intended, such party is not in a position to insist that he has actually set up a counter-claim, and the answer should be construed and considered as a defense.⁸ To designate a counter-claim as a "further defense" is not sufficient.⁹ So where one pleads a defense as a

"first defense," he cannot, if it proves insufficient as such, claim it to be a counter-claim.¹⁰ But if the plaintiff treats the answer as a counter-claim by demurring to it as such, he thereby waives his right to object that it does not contain a counter-claim, because the matters alleged therein are not so denominated.¹¹ After a plaintiff has joined issue upon a counter-claim, he cannot object that the caption did not contain the words "answer and counter-claim," as required by statute.¹² It is not objectionable, in pleading a counter-claim composed of several demands, to include them all in the same statement of new matter, the whole constituting but one counter-claim.¹³ But the pleading must show the existence of the counter-claim at the commencement of the action.¹⁴ It is not necessary that the counter-claim should be an answer to the whole of the plaintiff's cause of action,¹⁵ but it must operate in whole or in part to defeat his right of recovery.¹⁶ The defendant may, by pleading a counter-claim, recover a balance in excess of the plaintiff's claim;¹⁷ but where he deems himself entitled to a recovery by way of counter-claim, he must demand affirmative relief in the answer.¹⁸ And a defendant is as much concluded by the amount of damages he claims in his counter-claim, as a plaintiff would be by the damages claimed in his complaint.¹⁹ Whether facts set forth in an answer constitute an admissible counter-claim can only be properly determined on demurrer, or objection on the trial.²⁰

1 *Reese v. Gordon*, 19 Cal. 150; *Quinn v. Smith*, 49 Cal. 165; *Kinney v. Miller*, 25 Mo. 576.

2 *Van Valen v. Lapham*, 5 Duer, 630; *Clough v. Murray*, 19 Abb. Pr. 97; *Sullivan v. Byrne*, 10 S. C. 122; *Selleck v. Griswold*, 43 Wis. 39; *Union Nat. Bank v. Carr*, 49 Iowa, 35; *Reed v. Ref. Dutch Church*, 13 Phila. 53; *Resch v. Senn*, 31 Wis. 133.

3 *Brannan v. Paty*, 53 Cal. 320; *King v. Enterprise Ins. Co.* 45 Ind. 43.

4 *Vassear v. Livingston*, 4 Duer, 285; 13 N. Y. 248; *Wright v. Bacheller* 16 Kan. 259; *Sale v. Bugher*, 24 Kan. 432; *Allen v. Doug.*

BOONE PLEAD. — 15.

lass, 29 Kan. 412; *Kinard v. Sanford*, 64 Ga. 630; *Garrett v. Love*, 89 N. C. 205.

5 *Allen v. Douglass*, 29 Kan. 412.

6 *Cragin v. Lovell*, 2 Civ. Proc. R. 123; 83 N. Y. 253.

7 See *Bloom v. Lehman*, 27 Ark. 489; *Holmes v. Richet*, 56 Cal. 207; *Hill v. Butler*, 6 Ohio St. 216; *Lancaster Manuf. Co. v. Colgate*, 12 Ohio St. 344; *Springer v. Dwyer*, 59 N. Y. 19; *Ward v. Craig*, 87 N. Y. 550; *Brunt v. Day*, 8 Abb. N. C. 331; 81 N. Y. 251.

8 *Equitable Life Assur. Soc. v. Cuyler*, 12 Hun, 247; 75 N. Y. 511.

9 *Clough v. Murray*, 19 Abb. Pr. 97; *Bates v. Rosekrans*, 37 N. Y. 403; 4 Abb. Pr. N. S. 274.

10 *Simmons v. Kayser*, 11 Jones & S. 131. And see *Beers v. Waterbury*, 8 Bosw. 396; *Burke v. Thorne*, 44 Barb. 363. An answer will not be regarded as pleading a counter-claim, when it asks that the sum therein mentioned may be set off against any sum that may be allowed to the plaintiff: *American Dock etc. Co. v. Staley*, 8 Jones & S. 539.

11 *Voechting v. Grau*, 55 Wis. 312; *Selleck v. Griswold*, 49 Wis. 39.

12 *Cason v. Cason*, 79 Ky. 553. And see *Nutter v. Johnson*, 80 Ky. 426; *Hammond v. Terry*, 3 Lans. 186; *Fitzgerald v. Cross*, 30 Ohio St. 444.

13 *Ranney v. Smith*, 6 How. Pr. 420.

14 *Gannon v. Dougherty*, 41 Cal. 631.

15 *Allen v. Haskins*, 5 Duer, 332.

16 *Mattoon v. Baker*, 24 How. Pr. 323; *Nat. Fire Ins. Co. v. McKay*, 21 N. Y. 191; *Leavenworth v. Packer*, 52 Barb. 132.

17 *Ogden v. Coddington*, 2 Smith, E. D. 317. And see *Hay v. Short*, 40 Mo. 139; *Terrell v. Walker*, 61 N. C. 244; *Morrison v. Lovejoy*, 6 Minn. 319; *Clarkson v. Mauson*, U. S. Cir. Ct. 60 How. Pr. 45.

18 *Shute v. Hamilton*, 3 Daly, 482; N. Y. Code Civ. Proc. § 509. Compare *Read v. Decker*, 5 Hun, 646; 67 N. Y. 132.

19 *Annis v. Upton*, 66 Barb. 370.

20 *Collins v. Swan*, 7 Robt. 94; *Pittman v. Mayor etc.* 3 Hun, 329; 62 N. Y. 637. An objection that a claim set up in the answer was not the proper subject of a counter-claim cannot be raised for the first time on appeal: *Vaun v. Rouse*, 94 N. Y. 401; 18 N. Y. Week. Dig. 313; *Ashley v. Marshall*, 20 N. Y. 494; *Gleadell v. Thomson*, 56 N. Y. 194. The right of set-off is governed by the law of the place where the action is brought: *Savery v. Savery*, 3 Iowa, 274; *Second Nat. Bank v. Hemingray*, 31 Ohio St. 163; and by the law in force when the action is commenced: *Jordon v. Shoe & Leather Bank*, 12 Hun, 512; 74 N. Y. 467.

§ 102. **Cross-pleading.**—Under the practice in chancery, if the defendant wished to pray any affirmative relief, he was compelled to file a bill of his own, entitled a cross-bill, and was not allowed to plead a claim or demand for such relief as a counter-claim.¹ And in some of the Code States, the rules of practice in courts of

chancery relative to the cross-bill, as modified by the spirit of the Code, are still resorted to.³ In other States, express provision is made for a cross-complaint or petition, enabling a defendant to obtain thereby affirmative relief against any of the other parties.³ Thus, in California, whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint.⁴ Such cross-complaint must in itself, like a complaint, state all the requisite facts to entitle the defendant to affirmative relief, and defects in it cannot be cured by the averments of any other pleading in the action.⁵ In Ohio, the cross-petition may be contained in the answer, without any formal designation.⁶ The plaintiff against whom an answer demanding "affirmative relief" is filed is a defendant to a cross-petition.⁷ And it is not necessary, to entitle the defendant to set up in his answer a claim to relief by way of cross-petition, that the answer should contain a denial of the allegations of the petition, or a statement of new matter.⁸ In New York, the counter-claim secures to a defendant all the relief, which either an action at law or a bill in equity or a cross-bill would have secured on the same state of facts, and no express provision has been made for a cross-complaint.⁹ Under the statute of Indiana,¹⁰ the defendant in a divorce suit may not only file an answer, but also a cross-petition, and the court may decree the divorce to the defendant upon evidence introduced by the plaintiff only.¹¹ As to the sufficiency of a cross-pleading, it is held that a cross-complaint, filed by a defendant in an action for the recovery of real estate, averring his ownership of

the property that the plaintiff asserts title thereto, but has none, is good on demurrer.¹² So a description of real estate in a cross-complaint in an action to quiet title, omitting the county and State, but designating it as "the real estate in the complaint mentioned," was held sufficient.¹³ In a cross-action in an attachment suit for the wrongful suing out of the writ, the defendant must allege that the damages which he claims to have sustained have not been paid, and a cross-petition defective in this respect may be assailed by demurrer.¹⁴ It has been held, that while it is true that a cross-complaint must be substantially sufficient to maintain an action in favor of the cross-complainant, independently of the averments of the complaint, yet in matters of mere description it may refer to and adopt some of the allegations of the complaint;¹⁵ and this is particularly the case as to written instruments, and copies of such instruments, filed with the complaint, and common to both pleadings.¹⁶ And in an action upon a promissory note, a cross-complaint asking to have the note delivered up and cancelled need not set out a copy of the note.¹⁷ A cross-complaint filed in a foreclosure suit, asserting a title to the land described in the mortgage, is essentially an action to quiet title, and the pleading and practice in such cases must be essentially the same as in actions instituted to quiet title.¹⁸

1 See *Mitt. Eq. Plead.* 81; 2 *Walt's Pr.* 474. The allegations of the cross-bill must grow out of and be connected with the subject-matter of the original bill: *Heard v. Case*, 32 Ill. 45; *Crisman v. Heiderer*, 5 Colo. 583; *Daniel v. Morrison*, 6 Dana, 186; *May v. Armstrong*, 3 Marsh. J. J. 262; *Cross v. Del Valle*, 1 Wall. 5.

2 See *Tucker v. St. Louis Life Ins. Co.* 63 Mo. 538; *Fletcher v. Holmes*, 25 Ind. 463.

3 Cal. Code Civ. Proc. § 442; Ohio Rev. Stats. § 5059; Iowa Code, § 2663; Ky. Code, § 96.

4 Cal. Code Civ. Proc. § 442; *Moyle v. Porter*, 51 Cal. 639. In Kentucky, a cross-petition must set up a cause of action affecting the subject-matter of the action: *Royse v. Reynolds*, 10 Bush, 286; *Crabtree v. Banks*, 1 Met. 484.

5 *Kreichbaum v. Melton*, 49 Cal. 55; *Collins v. Bartlett*, 44 Cal. 381. See *O'Connor v. Frasher*, 53 Cal. 435; *Thompson v. Thompson*, 52 Cal. 154; *Lynch v. Brigham*, 51 Cal. 491; *McAbee v. Randall*, 41 Cal. 137; *Doyle v. Franklin*, 40 Cal. 110; *James v. Center*, 53 Cal. 31.

6 *Klonne v. Bradstreet*, 7 Ohio St. 322.

7 *Kimmel v. Pratt*, 40 Ohio St. 344.

8 *Bradford v. Andrews*, 20 Ohio St. 208. See *Fithian v. Corwin*, 17 Ohio St. 118.

9 See *Boston etc. Mills v. Eull*, 1 Sweeny, 350; 6 Abb. Pr. N. S. 319; 37 How. Pr. 290; *Leavenworth v. Packer*, 52 Barb. 132.

10 Rev. Stats. (1881) § 1040.

11 *Glasscock v. Glasscock*, 24 Ind. 163.

12 *Collins v. McDuffie*, 89 Ind. 562. The question of the sufficiency of the facts stated in a cross-complaint, to constitute a cause of action, is not waived by the failure to demur: *Gossard v. Woods*, 93 Ind. 195.

13 *Cookerly v. Duncan*, 87 Ind. 332.

14 *Hencke v. Johnson*, 62 Iowa, 533.

15 *Cookerly v. Duncan*, 87 Ind. 332. See *Masters v. Beckett*, 83 Ind. 595.

16 See *Branham v. Johnson*, 62 Ind. 250; *Crowder v. Reed*, 80 Ind. 1; *Ewing v. Patterson*, 35 Ind. 328; *Pattison v. Vaughan*, 40 Ind. 253; *Sidener v. Davis*, 69 Ind. 336.

17 *Gardner v. Fisher*, 87 Ind. 363. See *Citizens' State Bank v. Adams*, 91 Ind. 280.

18 *Fitzpatrick v. Papa*, 89 Ind. 17. And see *Ewing v. Patterson*, 35 Ind. 328; *Board of Commissioners v. Railroad Co.* 50 Ind. 85.

CHAPTER VI.

REPLY.

- § 103. When necessary, in general.
- § 104. Form of.
- § 105. Departure.
- § 106. In particular cases.
- § 107. Waiver of.
- § 108. In cases not required.
- § 109. Grounds of demurrer to.

§ 103. When necessary, in general. — A reply is the last pleading of fact which is permitted under the Code system of pleading, strictly speaking, but a rejoinder, surrejoinder, and subsequent pleadings are likewise allowed under the Kentucky Code.¹ On the other hand, no reply is permitted under the California Code,² and so in Nevada;³ and the statement of any new matter in the answer, in avoidance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party.⁴ In some of the States, a reply must be made to all material allegations of new matter in answer, or they will be taken as true.⁵ In still others, no reply to new matter in the answer is necessary, unless such new matter constitutes a counter-claim or set-off;⁶ except that, in a few of these latter States, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter.⁷ In Iowa, a reply is not admissible, except to a counter-claim, or to plead matter in avoidance of the defense set up by the defendant;⁸ and where a reply both denies the allegations of an answer which is not a counter-claim, and pleads matter in avoidance thereof, the denial must be disregarded, and the plea in avoidance must be regarded as implying a confession

of the answer.⁹ If an answer contains no new matter, but merely denies the allegations of the complaint or petition, no reply is required;¹⁰ as, for instance, an answer denying that the defendant committed the act charged, and alleging that it was committed by a third person, is merely a denial, and requires no reply.¹¹ So where an answer purports to admit a certain fact not stated in the complaint or petition, such answer will not be construed as alleging affirmatively that such fact exists, so as to require the plaintiff to reply thereto.¹² And the failure to reply to a defense set up in the separate answer of one defendant is no admission of such defense as to the other defendant not setting it up.¹³ So where a case has been tried as if a reply was on file, and the evidence has been closed, the fact that there is no reply will not be taken as an admission of the new matter in the answer.¹⁴

1 Code, §§ 98-100. See *Nutter v. Johnson*, 80 Ky. 428; *Crapster v. Williams*, 21 Kan. 109.

2 Code Civ. Proc. § 422. And see *Bryan v. Maume*, 28 Cal. 238; *Herold v. Smith*, 34 Cal. 122.

3 Comp. Laws, § 1101. So in Idaho: Code, § 228.

4 Cal. Code Civ. Proc. § 462; Nev. Comp. Laws, § 1128; *Doyle v. Franklin*, 40 Cal. 106; *Colton Co. v. Raynor*, 57 Cal. 588.

5 Neb. Code Civ. Proc. § 109; *Scofield v. State Nat. Bank*, 9 Neb. 316; Ohio Code Civ. Proc. § 101; *Creighton v. Kellerman*, 1 Disn. 548; Ind. Code Civ. Proc. § 67; *Kimberling v. Hall*, 10 Ind. 407; *Wagn. Mo. Stats.* p. 1017, § 15; Kan. Code Civ. Proc. § 102; *Ballanger v. Lantier*, 15 Kan. 608; *Board of Education v. Shaw*, 15 Kan. 33; Oreg. Code Civ. Proc. § 75.

6 N. C. Code Civ. Proc. § 105; N. Y. Code Civ. Proc. § 514; *Devlin v. Bevins*, 22 How. Pr. 290; Wis. Rev. Stats. (1878) § 2661; *Stowell v. Eldred*, 39 Wis. 614; S. C. Code Proc. § 176; Ariz. Code Civ. Proc. § 61; Ark. Dig. (1874) § 4579; *Cannon v. Davies*, 33 Ark. 56; Colo. Code Civ. Proc. § 122; Minn. Code Proc. § 83; *Vassear v. Livingston*, 13 N. Y. 248; *Metrop. Life Ins. Co. v. Meeker*, 85 N. Y. 614.

7 See N. Y. Code Civ. Proc. § 516; *Hubbell v. Fowler*, 1 Abb. Pr. N. S. 1; *Dillon v. Sixth Av. R. R. Co.* 14 Jones & S. 21. If the defendant knows, with reasonable certainty, the answer which will be given to his defense, the court will refuse to require the plaintiff to reply; *Hubbell v. Fowler*, 1 Abb. Pr. N. S. 1; *Jarvis v. Pike*, 11 Abb. Pr. N. S. 398.

8 Iowa Code, § 2665; *Zinck v. Phoenix Ins. Co.* 60 Iowa, 266; *Meadows v. Hawkeye Ins. Co.* 62 Iowa, 387.

- 9 *Meadows v. Hawkeys Ins. Co.* 62 Iowa, 387.
- 10 *Meyer v. Binkleman*, 5 Colo. 262; *Riddle v. Parke*, 12 Ind. 80; *State v. Williams*, 48 Mo. 210; *Ferris v. Johnson*, 27 Ind. 247; *Ferguson v. Tutt*, 8 Kan. 370; *Corry v. Campbell*, 25 Ohio St. 134; *Heath v. White*, 3 Utah, 474.
- 11 *Hoffman v. Gordon*, 15 Ohio St. 212.
- 12 *Holsington v. Armstrong*, 22 Kan. 110.
- 13 *Bartholow v. Campbell*, 56 Mo. 117.
- 14 *Henslee v. Cannefax*, 49 Mo. 295; *Meador v. Malcolm*, 78 Mo. 550; *Simmons v. Carrier*, 68 Mo. 421. An answer averring conclusions of law from facts already stated in the complaint or petition does not set up new matter, and does not require a reply: *State v. Williams*, 77 Mo. 468.

§ 104. **Form of.** — Under Codes which require a reply to all material allegations of new matter in the answer, the reply may consist either of denials or of new matter set up in avoidance of the answer.¹ Or under Codes which make a reply necessary only when the answer contains new matter constituting a counter-claim, the plaintiff may reply thereto either by denials or by the statement of new matter in confession and avoidance.² In either case, as generally provided, the plaintiff may deny generally or specifically, each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief;³ and he may allege, in ordinary and concise language, any new matter not inconsistent with the complaint or petition, constituting a defense to such new matter or counter-claim in the answer.⁴ A reply must be distinct and specific, so that it may be clearly seen what is controverted.⁵ But a reply which denies all those allegations which are contained within certain specified folios is held to be good.⁶ A reply setting up facts inconsistent with the answer amounts to a direct denial of it.⁷ But a reply denying that the defendant is entitled to the sum he claims for damages, or to any other sum, is bad.⁸ It is not the province of a reply to introduce new causes of action.⁹ And setting out the cause of action a second

time, or a new assignment of it, is not allowable under Code pleading.¹⁰ And since a reply can only respond to the new matter set up in the answer, the omission of necessary averments in the complaint or petition cannot be cured by the reply.¹¹ A denial by the plaintiff in his reply, upon information and belief, of allegations in the defendant's answer, is insufficient where the facts set up in the answer are clearly within the plaintiff's knowledge, as appears by the averments in the complaint.¹² A reply may contain two or more distinct avoidances of the same defense or counter-claim, but they must be separately stated and numbered.¹³

1 See Ind. Code Civ. Proc. § 67; *Kimberlin v. Carter*, 49 Ind. 111; *Kan. Code Civ. Proc. § 102*; *Netcott v. Porter*, 19 Kan. 131; *Payne v. Briggs*, 8 Neb. 75; *Snodgrass v. Hunt*, 15 Ind. 274; *Clapp v. Cunningham*, 50 Iowa, 307; *Eldenour v. Mayo*, 29 Ohio St. 138.

2 N. Y. Code Civ. Proc. § 514. See *Chowriteau v. Fay*, 54 How. Pr. 211; *Johnson v. White*, 6 Hun, 587; *Argotslinger v. Vines*, 82 N. Y. 308; *Metrop. Life Ins. Co. v. Meeker*, 85 N. Y. 614. An answer of payment, in whole or in part, is not a counter-claim, and an omission to reply is not an admission that the payments were made: *Scott v. Stockwell*, 65 How. Pr. 240. And see *Kirk v. Woodbury Co.*, 55 Iowa, 180. A general denial in a reply does not permit the plaintiff to prove an affirmative defense to the counter-claim: *McClendon v. Wells*, 20 S. C. 514.

3 See Ohio Code Civ. Proc. § 101; N. Y. Code Civ. Proc. § 514; *Wing v. Dugan*, 8 Bush, 583.

4 Ohio Code Civ. Proc. § 101; N. Y. Code Civ. Proc. § 514. And see *Hammer v. Edwards*, 3 Mont. 187.

5 *Risley v. Caryl*, 1 N. Y. Month. Law Bull. 52; *Mattison v. Smith*, 19 Abb. Pr. 288; 1 Robt. 706. New matter must be specially pleaded in the reply, as in the answer: *Kimberling v. Hall*, 10 Ind. 407.

6 *Gassett v. Crocker*, 9 Abb. Pr. 39. And see *McConnoughey v. Weider*, 2 Iowa, 408. Compare *Leyde v. Martin*, 16 Minn. 33.

7 *Meredith v. Lackey*, 14 Ind. 529.

8 *McKensie v. Farrell*, 4 Bosw. 192. A reply which avers nothing in denial or avoidance of matter set up in the answer is bad on demurrer: *Chrisman v. Chenowith*, 81 Ind. 401.

9 *Durbin v. Fisk*, 16 Ohio St. 533; *School District v. Caldwell*, Sup. Ct. Neb. 19 N. W. Rep. 634; 16 Neb. 68.

10 *Shull v. Green*, 34 How. Pr. 418; 49 Barb. 311; *Stewart v. Wallis*, 30 Barb. 344.

11 *Bernheimer v. Marshall*, 2 Minn. 78; *Webb v. Bidwell*, 15 Minn. 479. A reply cannot change or enlarge the character of the action stated in the complaint, or the rights or remedies of the plaintiff: *Hatch v. Coddington*, 32 Minn. 92.

12 *Fallon v. Durant*, 60 How. Pr. 178. See *Wing v. Dugan*, 8 Bush, 583.

13 N. Y. Code Civ. Proc. § 517. It seems that a plaintiff cannot, in his reply, plead an independent counter-claim to a counter-claim set up by the defendant: See *Cohn v. Husson*, 24 N. Y. Daily Reg. No. 143; 66 How. Pr. 150; *Hall v. Hall*, 30 How. Pr. 51. 56; *Breed v. Padgett*, 14 N. Y. Week. Dig. 574; *Ormsbee v. Brown*, 50 Barb. 438. But compare *Miller v. Losee*, 9 How. Pr. 356; *Reilly v. Rucker*, 18 Ind. 303; *House v. McKinney*, 54 Ind. 240. In an action of a legal nature an equitable reply is available to defeat a legal defense: *Wadsworth v. Lyon*, 93 N. Y. 201.

‡ 105. **Departure.**—Statements in a reply not constituting a departure, that is, not inconsistent with the complaint or petition, whether they be denominated new matter or matter in avoidance, are permissible.¹ But if there is an inconsistency between the reply and the case as made in the complaint or petition, it is a departure, advantage of which may be taken by demurrer.² It is a departure where the complaint alleges a direct undertaking by the defendant, and the reply charges a guaranty only.³ So a reply showing that the plaintiff is a trustee, and has no right to maintain the action in the individual capacity in which he sues, is faulty as a departure.⁴ So a plaintiff is entitled to recover only on the causes of action set out in his complaint or petition, and if he seeks to introduce new causes of action in his reply it is a departure.⁵ But where the complaint alleged ownership of stock in the plaintiff, and the reply set up a special ownership as pledgee, this was held not a departure, the action being for damages against a corporation for refusing to transfer the stock on its books.⁶

1 *Lebanon Min. Co. v. Consolidated Rep. Min. Co.*, 6 Colo. 371; *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 344; *Benson v. Stein*, 34 Ohio St. 294; *Suman v. Inman*, 3 Mo. App. 536. See *Thomas v. Loaners' Bank*, 6 Jones & S. 466, 470; *Campbell v. Mellen*, Sup. Ct. Wis. 21 N. W. Rep. 864.

2 *Suman v. Inman*, 3 Mo. App. 596; *Laws v. Carrier*, 2 Cin. Rep. 80; *Newcomb v. Weber*, 1 Cin. Rep. 12; *Beard v. Hand*, 88 Ind. 183. Where the reply is a departure in pleading, it is bad on demurrer for the want of sufficient facts: *Haas v. Shaw*, 91 Ind. 384. A bad reply is a good enough reply to an insufficient answer, and a demurrer to

such reply ought to be carried back and sustained to such answer: *Wilbite v. Hamrick*, 92 Ind. 594. Irrelevant matter in a reply can be reached only by motion: *Ludington v. Slauson*, 6 Jones & S. 81.

3 *Phillbert v. Burch*, 4 Mo. App. 470. And see *Magruder v. Admire*, 4 Mo. App. 133.

4 *Laws v. Carrier*, 2 Cln. Rep. 80. And see *White v. Miles*, 11 How. Pr. 38.

5 *Durbin v. Ward*, 16 Ohio St. 533; *School District v. Caldwell*, Sup. Ct. Neb. 19 N. W. Rep. 634; *Burdell v. Denig*, 15 Fed. Rep. 397.

6 *Merchants' Nat. Bank v. Richards* 6 Mo. App. 454. See *Waters v. Reuber*, 16 Neb. 99; *School District v. McIntie*, 14 Neb. 46.

§ 106. In particular cases.—A reply to the Statute of Limitations is required to be definite and explicit, and the party relying upon the defense of the statute should be apprised of the issue to be made upon it, whether it be one of denial or avoidance.¹ When the complaint in an action states facts from which, though the original claim was barred by the statute, a new promise may be inferred, and the answer alleges that no "cause of action on the contract sued on accrued within six years next before the bringing of the suit," this averment need not be denied in a reply.² But when the complaint simply sets out the original contract, and the answer relies upon the statute, then the answer must be met by a reply setting up the facts which imply the new promise.³ A reply to an answer of discharge in bankruptcy, which seeks to avoid the discharge upon the ground that the debt sued on was created by the fraud of the bankrupt, must aver the facts which constitute actual fraud involving intentional wrong.⁴ But it is held in New York, that an answer of discharge in bankruptcy may be met by proof of the fraud, and this without serving a reply, unless a reply has been directed by the court as provided by the statute.⁵ But where the discharge is relied on by the plaintiff as a bar to a counter-claim set up by the defendant, it should be pleaded by reply.⁶ In an action to determine adverse claims to real estate,

the defendant having, by answer, asserted a legal title in himself, the plaintiff may, in reply, plead facts showing an equitable title in the plaintiff of such a nature that it should prevail over the alleged title of the defendant.⁷ In an action for divorce on the ground of adultery, an answer setting up counter-charges of adultery against the plaintiff, and asking a divorce in favor of the defendant, is to be regarded as setting up a counter-claim requiring a reply.⁸ In an action for dower, the defense was that a divorce had been granted against the plaintiff, and it was held that a motion to compel a reply should be granted.⁹ In an action to recover money due under a contract for the purchase of land, the answer alleged that the contract and a deed of the premises together constituted a mortgage given to secure a usurious loan, and asked that they be declared void, and it was held that the answer contained matter constituting a counter-claim which required a reply.¹⁰ In New York, no reply is required to the defense of a release, unless directed by special order of the court;¹¹ nor does a defense of set-off need a reply;¹² so when an answer sets up that the plaintiff is not the real party in interest, a reply is not necessary.¹³ In Wisconsin, the defense of the Statute of Limitations is not a counter-claim, and need not be replied to;¹⁴ so an estoppel in rebuttal of a defense is provable without pleading it by reply to the answer.¹⁵

1 *Jarys v. Pike*, 11 Abb. Pr. N. S. 386.

2 *Buckingham v. Orr*, Colo. Sup. Ct. 4 Colo. L. R. 88.

3 *Buckingham v. Orr*, Colo. Sup. Ct. 4 Colo. L. R. 88. And see *Hexter v. Clifford*, 5 Colo. 168; *Smith v. Hall*, 19 Cal. 85; *Clark v. Atkinson*, 2 Smith, E. D. 112; *Watkins v. Stevens*, 4 Barb. 168; *Cutler v. Wright*, 22 N. Y. 472; *Conkey v. Barbour*, 22 Ind. 196; *Woodward v. Sloan*, 27 Ohio St. 596; *Clinton v. Eddy*, 37 How. Pr. 23; 54 Barb. 54; 1 Lans. 61; *Williams v. Willis*, 15 Abb. Fr. N. S. 11.

4 *Hamilton v. Reynolds*, 88 Ind. 191.

5 *Argall v. Jacobs*, 87 N. Y. 110; 21 Hun, 114. And see *Hun v. Cary*, 82 N. Y. 65; *Talcott v. Harris*, 18 Hun, 567. Compare *Freund v. Paten*, 10 Abb. N. C. 311; *Welsh v. German-American Bank*, 10 Jones & S. 462.

- 6 *Raymond v. Baker*, 66 Barb. 605.
- 7 *School District v. Wrabeck*, 31 Minn. 77. And see *State v. Bachelder*, 5 Minn. 178; *Walton v. Perkins*, 28 Minn. 413.
- 8 *Leslie v. Leslie*, 11 Abb. Pr. N. S. 311.
- 9 *Brinkerhoff v. Brinkerhoff*, 8 Abb. N. C. 207.
- 10 *Geenia v. Keech*, 66 Barb. 245. Compare *Westervelt v. Ackley*, 2 Hun, 258; 62 N. Y. 505.
- 11 *Dambmann v. Schulting*, 4 Hun, 50.
- 12 *American Dock etc. Co. v. Staley*, 8 Jones & S. 530.
- 13 *Johnson v. White*, 6 Hun, 587.
- 14 *Merriam v. Field*, 24 Wis. 640.
- 15 *Gans v. Insurance Co.* 43 Wis. 108; *Waddle v. Morrill*, 23 Wis. 611.

§ 107. *Waiver of.*—Where the facts alleged by way of defense in an answer are not denied in the reply, and the case proceeds to trial upon the evidence as if such facts were denied, without objection or exception, the want of a reply will be deemed waived.¹ An affirmative answer, where the case has been tried without a reply, will be deemed to have been controverted on the trial, in the same manner as if a reply in denial had been filed;² the fact that there is no reply in such case will not be taken as an admission of the new matter in the answer,³ and the judgment will not be reversed for want of a reply.⁴ So if the parties go to trial without a reply to one of several paragraphs of answer, all of which are affirmative, such reply is waived, and the defendant has the burden of proving that paragraph.⁵ So, although a counter-claim is taken to be true unless replied to,⁶ yet where an answer sets up a counter-claim to which there is no reply, and the trial proceeds as if every matter contested by the parties was at issue, and no point is raised that the counter-claim is admitted, it cannot be taken on appeal.⁷

1 *State v. Williams*, 77 Mo. 463; *Simmons v. Carrier*, 68 Mo. 421; *Woodward v. Sloan*, 27 Ohio St. 592; *Lovell v. Wentworth*, 39 Ohio St. 614; *Nooner v. Short*, 20 Kan. 624; *Bent v. Philbrick*, 18 Kan. 190; *Hopkins v. Cothran*, 17 Kan. 173; *Wilson v. Fuller*, 9 Kan. 190; *Gibbs v. Dickson*, 33 Ark. 107.

2 *McAllister v. Howell*, 42 Ind. 15, 23.

3 *Henslee v. Cannefax*, 49 Mo. 295; *Meador v. Malcolm*, 78 Mo. 550.

BOONE PLEAD.—16.

4 Woodward v. Sloan, 27 Ohio St. 592. Although a reply where required was not filed, the court should not for that reason set aside a verdict, but should allow a reply to be filed *nunc pro tunc* to aid the verdict: Foley v. Alkire, 52 Mo. 317.

5 Wilcox v. Majors, 88 Ind. 203; Breidert v. Krueger, 92 Ind. 142. And see Dodds v. Vannoy, 61 Ind. 89; Benoit v. Schneider, 47 Ind. 13.

6 Randolph v. Mayor etc. 53 How. Pr. 68; Clinton v. Eddy, 37 How. Pr. 23; 54 Barb. 54; 1 Lans. 61.

7 Jordon v. Nat. Shoe & Leather Bank, 74 N. Y. 467; 12 Hun, 512.

§ 108. In cases not required.—No reply is required under the procedure of some of the States,¹ and the statement of any new matter in the answer, in avoidance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party.² This allows a plaintiff, in reply to such new matter, to introduce on the trial any evidence which countervails or overcomes it, as if it were inserted in a replication, and pleaded with all the precision and fullness which the strictest rules of law ever required.³ And the same rule applies to the answer to a cross-complaint.⁴ So if a reply is not necessary unless the answer sets up a counter-claim, the plaintiff may prove any matter in denial or avoidance of the answer, when it sets up an affirmative defense, which is not a counter-claim.⁵ Thus, in New York, when the answer contains only new matter constituting a defense *by way of avoidance*, a reply put in without the direction of the court is irregular, and should be stricken out;⁶ it is only requisite that the complaint state facts sufficient to make out a cause of action, and if the answer sets up facts which, if true, would destroy that cause of action, the plaintiff may meet them by proof in rebuttal or avoidance.⁷ And when a reply is not necessary, it cannot be ordered on the plaintiff's application, and the defendant be compelled to receive it.⁸ Generally speaking, no reply is necessary where the answer is only a general denial,⁹ or where the allegations in the answer raise only the question of the truth of the alle-

gations set forth in the complaint or petition.¹⁰ And allegations in an answer which are merely conclusions of law need no reply.¹¹ New matter which requires a reply, within the meaning of the statute, is such matter as must be affirmatively pleaded.¹² A reply put in without necessity cannot be set aside for want of verification.¹³ A reply interposed to the original answer is good as a reply to an amended answer, which only adds matter not requiring a reply.¹⁴ And a reply to an answer will stand as the reply to the answer to an amended complaint, if so treated by the parties at the trial, without objection.¹⁵

1 See § 103, *ante*.

2 Cal. Code Civ. Proc. § 462.

3 *Curtiss v. Sprague*, 49 Cal. 301; *Colton Land etc. Co. v. Raynor*, 57 Cal. 588.

4 *Colton Land etc. Co. v. Raynor*, 57 Cal. 588.

5 *Metrop. Life Ins. Co. v. Meeker*, 85 N. Y. 614; *O'Gorman v. Arnoux*, 63 How. Pr. 159; *Dillon v. Sixth Av. R. R. Co.* 14 Jones & S. 21.

6 *Dillon v. Sixth Av. R. R. Co.* 14 Jones & S. 21.

7 *Metrop. Life Ins. Co. v. Meeker*, 85 N. Y. 614.

8 *McDonald v. Davis*, 1 N. Y. Month. Law Bull. 20.

9 *Wilson v. Fuller*, 9 Kan. 177; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Davis v. Dycus*, 7 Bush, 4; *Uhl v. Harvey*, 78 Ind. 28. And see *Webb v. Corbin*, 78 Ind. 403.

10 *Ferguson v. Tutt*, 8 Kan. 370; *Netcott v. Porter*, 19 Kan. 131.

11 *Dunning v. Pond*, 5 Minn. 302. Compare *Evans v. Stone*, 80 Ky. 78.

12 *Nash v. City of St. Paul*, 11 Minn. 174; *Evans v. Stone*, 80 Ky. 78.

13 *Silliman v. Eddy*, 8 How. Pr. 122.

14 *Leslie v. Leslie*, 11 Abb. Pr. N. S. 311.

15 *Vaughan v. Howe*, 20 Wis. 497.

§ 109. Grounds of demurrer to.—The defendant may demur to the reply, or to a separate traverse to or avoidance of a defense or counter-claim contained in the reply, on the ground that it is insufficient in law upon its face.¹ And demurrers to the reply are to be governed by the rules prescribed in relation to demurrers to complaints or petitions, when applicable.²

At common law, if the replication did not support the declaration, it was bad on general demurrer.¹ So it is held under the Code system of pleading, that if the reply does not support the complaint, by reason of departure, the objection may be taken by demurrer;² though the contrary has also been held.³ So it was formerly held in New York that a counter-claim, not being a defense, a reply to it could not be demurred to;⁴ but the rule is now otherwise under the Code of Civil Procedure.⁵ A denial by the plaintiff in his reply, upon information and belief, of allegations in the defendant's answer, is insufficient where the facts set up in the answer are clearly within the plaintiff's knowledge, as appears by the averments in his complaint, and the objection may be taken by demurrer, though the question could also be raised by a motion to strike out.⁶ A reply containing irrelevant matter was held not to be demurrable for insufficiency, and that such matter could be reached only by motion.⁷ In Missouri, in case of a departure, the reply may be stricken out on motion.¹⁰

1 See N. Y. Code Civ. Proc. § 493; 2 Ohio Rev. Stats. § 5067; Wis. Rev. Stats. (1878) § 2663; N. C. Code Civ. Proc. § 107. The insufficiency which the Code makes a ground of demurrer to a reply is one of substance, not of form: *Flanders v. McVickar*, 7 Wis. 372. And see *Brown v. Tucker*, Sup. Ct. Colo. 1 West C. Rep. 489; 7 Colo. 30.

2 See §§ 41, *et seq. ante*; *Wagn. Mo. Stats.* p. 1017, § 17.

3 *Sterns v. Patterson*, 14 Johns. 132; *Keay v. Goodwin*, 16 Mass. 1.

4 *McAvoy v. Wright*, 25 Ind. 22. And see *Wilbitt v. Hamrick*, 92 Ind. 594; *Haas v. Shaw*, 91 Ind. 384; *Wells v. Morrison*, 91 Ind. 51; *Laws v. Carrier*, 2 Cin. Rep. 80; § 105, *ante*.

5 *White v. Joy*, 13 N. Y. 83. And see *Reilly v. Rucker*, 16 Ind. 303.

6 *Thomas v. Loaners' Bank*, 6 Jones & S. 466.

7 § 493.

8 *Fallon v. Durant*, 3 N. Y. Month. Law Bull. 13; 60 How. Pr. 178.

9 *Ludington v. Slauson*, 6 Jones & S. 81.

10 *Magruder v. Admire*, 4 Mo. App. 133; *Philibert v. Burch*, 4 Mo. App. 470. A special paragraph of reply, under the Code, which does not fully reply to all the material facts stated in the answer to which it is filed, is bad on demurrer for the want of sufficient facts; but the mere omission to notice a preliminary statement in the answer will not vitiate the reply, if it is otherwise a good reply to the merits of the defense stated in such answer: *Kinsey v. State*, 63 Ind. 351.

CHAPTER VII.

DEMURRER TO ANSWER.

- § 110. When it lies, in general.
- § 111. Form and sufficiency of.
- § 112. Sufficiency of prior pleadings considered on.
- § 113. One good defense.
- § 114. Where counter-claim is interposed.
- § 115. Instances of, sustained.
- § 116. When it will not lie.
- § 117. Effect of.
- § 118. As an admission of facts pleaded.

§ 110. When it lies, in general. — The only defects in pleading which can be reached and obviated by demurrer are those specified in the Code of the particular State, and demurrers interposed for causes or defects not therein enumerated should be overruled.¹ Provisions relating to demurrers to the answer vary to some extent in the Codes of the different States, but generally speaking, where the facts stated in an answer are insufficient in law to constitute a defense, counter-claim, or set-off, the proper mode of raising the question is by demurrer.² But the sufficiency of an answer as it respects certainty, precision, definiteness, and consistency of allegation must, in general, be taken advantage of by motion and not by demurrer.³ In New York, an answer which sets up no new matter, but merely denies the allegations of the complaint, is not demurrable, however defective may be the form of the denials.⁴ Nor is it a ground of demurrer, that matter constituting a defense is pleaded as a counter-claim.⁵ It has, however, been held in Kentucky, that the sufficiency of an answer which is nothing more than a mere denial may be tested upon demurrer.⁶ In California, the plaintiff may

demur to the answer of the defendant, or to one or more of the several defenses or counter-claims set up in the answer;⁷ and one of the grounds of demurrer is, that the answer is ambiguous, unintelligible, or uncertain.⁸ An answer is held to be insufficient in the sense of the Code of that State, not only where it sets up a defense which is groundless in law, but where in the mode of stating a defense, otherwise valid, it violates the primary and essential rules of pleading;⁹ and, therefore, if inconsistent defenses be set up in the answer, the defect may in some cases be reached by demurrer.¹⁰ Since an amended pleading takes the place of and supersedes the original one, the plaintiff may demur to an amended answer just as if it were an original one.¹¹ As a general rule, where objections to an answer are based on its alleged insufficiency in matter of substance, the objection ought to be taken by demurrer;¹² but a demurrer reaches such defects only as are apparent upon the face of the pleading to which it is directed.¹³

1 See *De Witt v. Swift*, 3 How. Pr. 280; *Richards v. Edick*, 17 Barb. 281; *Trustees etc. v. Odlin*, 8 Ohio St. 283; *Bushey v. Reynolds*, 31 Ark. 662; *Dunn v. Remington*, 9 Neb. 82; *Aurira v. Cobb*, 21 Ind. 492; *Caldwell v. Ruddy*, Sup. Ct. Idaho, 1 West C. Rep. 295.

2 2 Ohio Rev. Stats. §§ 5068, 5069; Ky. Civ. Code, § 121, subd. 1; Cal. Code Civ. Proc. §§ 443, 444; S. C. Code Civ. Proc. § 175; N. C. Code Civ. Proc. § 105; Dakota Code Civ. Proc. § 106; Ind. Code Civ. Proc. § 64; Neb. Code Civ. Proc. § 109; Wis. Rev. Stats. § 2658; N. Y. Code Civ. Proc. § 494; Oreg. Code Civ. Proc. § 74; Wash. T. Code Civ. Proc. § 87; Wyom. Code Civ. Proc. § 111; Minn. Code Civ. Proc. § 100; *Campbell v. Jones*, 25 Minn. 155; *Howell v. Stewart*, 54 Mo. 400.

3 *Bushey v. Reynolds*, 31 Ark. 657; *Bradley v. Parkhurst*, 20 Kan. 462; *Campbell v. Taylor*, 3 Utah, 325; *Becker v. Boon*, 61 N. Y. 317; *First Nat. Bank v. Church*, 3 Thomp. & C. 10; *Flanders v. McViekar*, 7 Wis. 377; *Hart v. Crawford*, 41 Ind. 197; *State v. Newlin*, 69 Ind. 108; *Ready v. Sommer*, 37 Wis. 265; *Hutchings v. Castle*, 48 Cal. 152; *Phoenix v. Lamb*, 29 Iowa, 354; *Wright v. Williams*, 83 Ind. 421.

4 *Smith v. Greening*, 2 Sand. 702; *Lund v. Seamen's Sav. Bank*, 37 Barb. 129; 23 How. Pr. 258; *People v. Barker*, 8 How. Pr. 258; *Maretzek v. Cauldwell*, 2 Robt. 715; 19 Abb. Pr. 35. And see *Oleson v. Hendrickson*, 12 Iowa, 222; *Adkins v. Wisemen*, 19 Ind. 90. But an answer which professes to set up new matter as a defense, and does not state facts which constitute one, may be demurred to for insuf-

iciency: *Merritt v. Millard*, 5 Bosw. 645; *Fabricotti v. Lannitz*, 3 Sand. 743; *White v. Drake*, 3 Abb. N. C. 133.

5 *Walt v. Ferguson*, 14 Abb. Pr. 373.

6 *Francis v. Francis*, 18 Mon. B. 57; *Clark v. Finnell*, 16 Mon. B. 329, 335.

7 Code Civ. Proc. § 443.

8 Code Civ. Proc. § 444, subd. 3.

9 *Klink v. Cohen*, 13 Cal. 623.

10 *Klink v. Cohen*, 13 Cal. 623; *Uridias v. Morrell*, 25 Cal. 31. Otherwise in Idaho: *Caldwell v. Ruddy*, Sup. Ct. Idaho, 1 West C. Rep. 295. And see *Larimer v. Kelley*, 10 Kan. 238.

11 *Sands v. Calkins*, 30 How. Pr. 1. And see *Cox v. Capron*, 10 Mo. 691. Compare *Therasson v. Peterson*, 22 How. Pr. 98.

12 See *Finch v. Finch*, 10 Ohio St. 501; *Everett v. Waymire*, 30 Ohio St. 308; *Loomis v. Youle*, 1 Minn. 175; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Otero v. Bullard*, 3 Cal. 188; *McGregor v. McGregor*, 21 Iowa, 441; *Taylor v. Richards*, 9 Bosw. 673.

13 *State v. McGarry*, 21 Wis. 496; *Powers v. Ames*, 9 Minn. 178; *Mayberry v. Kelly*, 1 Kan. 116; *Jones v. Bradford*, 25 Ind. 305; *Dorman v. Ames*, 9 Minn. 180; N. Y. Code Civ. Proc. § 494; N. C. Code Civ. Proc. § 105; *Cragin v. Quitman*, 22 Hun, 101.

§ 111. *Form and sufficiency of.*—In a demurrer to an answer, on the ground of insufficiency, no particular form of demurrer being prescribed, it is enough to allege generally that the answer is insufficient, and under such an allegation the plaintiff may avail himself of any insufficiency which goes to the merits of the answer.¹ But an answer is held to be sufficient against a general demurrer, if it puts the plaintiff to the proof of any material averment.² A demurrer must be directed to the whole of the answer, or to a particular and separate defense, and cannot be directed to a part of an entire defense, or to certain lines thereof.³ It is provided in the Codes of some of the States, that the plaintiff may demur to one or more of the defenses or counter-claims set up in answer, and reply to the residue of the counter-claims;⁴ and it is held, that where an answer sets up two distinct defenses, though they be not separately stated, the plaintiff may demur to one and reply to the other.⁵ Under the Iowa Code, a demurrer must specify the grounds of objection to the

pleading, or it will be disregarded by the court.⁶ In Indiana, if the facts stated in any paragraph of the answer are insufficient to constitute a cause of defense, the plaintiff may demur to it under the rules prescribed for demurring to a complaint;⁷ and a demurrer to an answer, assigning for cause that "neither of said paragraphs constitutes any defense to this action," is held to be too general, and insufficient under the Code, and should be overruled.⁸ A statutory cause of demurrer should be assigned.⁹ In New York, a demurrer to a counter-claim, upon which the defendant demands an affirmative judgment, must distinctly specify the objections to the counter-claim, in the same mode as where a demurrer is taken to a complaint;¹⁰ and the objections which may be thus interposed to the counter-claim are: (1) That the court has not jurisdiction of the subject thereof; (2) that the defendant has not legal capacity to recover upon the same; (3) that there is another action pending between the same parties, for the same cause; (4) that the counter-claim is not of the character defined and specified in the Code; (5) that the counter-claim does not state facts sufficient to constitute a cause of action.¹¹ That several causes of counter-claim have been improperly joined is a ground of demurrer under the California Code.¹² But an improper mingling in one statement of different grounds of defense, which are capable of joinder, in the same answer, is not ground of demurrer; the remedy is by motion.¹³

1 *Anibal v. Hunter*, 6 How. Pr. 255; *Hyde v. Conrad*, 5 How. Pr. 112; *Arthur v. Brooks*, 14 Barb. 553. And see *Howland v. Kenosha Co.* 19 Wis. 247. Compare *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372; 3 Bosw. 694.

2 *Ruth v. Ruth*, 12 Neb. 594.

3 *Locke v. Peters*, Sup. Ct. Cal. 2 West C. Rep. 725; *Cobb v. Frazee*, 4 How. Pr. 413; *Smith v. Brown*, 6 How. Pr. 383. Compare N. Y. Code Civ. Proc. § 508. The connected structure of a pleading cannot be destroyed or disjointed at the pleasure of the pleader, and its disconnected averments separately demurred to: *Herfort v. Cramer*, 7 Colo. 483.

- 4 See Minn. Code Civ. Proc. § 100; N. C. Code Civ. Proc. § 105.
- 5 Bass v. Upton, 1 Minn. 408.
- 6 Iowa Code, § 2649; Traders' Bank v. Alsop, Sup. Ct. Iowa, 19 N. W. Rep. 863; Jones v. Brunskill, 18 Iowa, 129; Allen v. Cerro Gordo Co. 34 Iowa, 54; Middleton Sav. Bank v. Dubuque, 15 Iowa, 394; Davenport v. Whisler, 46 Iowa, 287.
- 7 Ind. Code Civ. Proc. § 100. See Clodfelter v. Hulett, 92 Ind. 426; Rowe v. Major, 92 Ind. 206; Wright v. Nipple, 92 Ind. 310; Matlock v. Hawkins, 92 Ind. 225.
- 8 Reed v. Higgins, 80 Ind. 143; Lane v. State, 7 Ind. 423.
- 9 Tenbrook v. Brown, 17 Ind. 410; Thomas v. Goodwine, 88 Ind. 450. The sufficiency of the allegations of a paragraph of answer pleaded to the whole complaint is properly tested by a demurrer for want of sufficient facts: State v. Newlin, 63 Ind. 108.
- 10 N. Y. Code Civ. Proc. § 496; Safford v. Snedeker, 67 How. Pr. 264.
- 11 N. Y. Code Civ. Proc. § 495. See also 2 Ohio Rev. Stats. § 5063.
- 12 Cal. Code Civ. Proc. § 444, subd. 1.
- 13 Akerly v. Villas, 25 Wis. 703. And see Sentinel Co. v. Thomson, 38 Wis. 489; Clark v. Langworthy, 12 Wis. 441; Riemer v. Johnke, 37 Wis. 258. The question of the sufficiency of the facts stated in a counter-claim, to constitute a cause of action, is not waived by the failure to demur: Gossard v. Woods, 98 Ind. 195.

§ 112. Sufficiency of prior pleadings, considered on.—It is a rule of pleading at common law that, upon a demurrer, the court will view the whole record and give judgment to the party who thereon appears entitled to it.¹ This rule is also retained under the Code system, though its strictness as to form is to some extent relaxed;² and a demurrer to a later pleading searches the record, and seizes upon the first error in the earlier pleadings, whether such error was originally objected to or not,³ and judgment will be given against the party whose pleading is first defective in substance.⁴ Thus, upon the argument of a demurrer to an answer, the defendant may attack the complaint or petition upon the ground that the court has no jurisdiction, or that the complaint or petition does not state facts sufficient to constitute a cause of action; and if it appears that the objections thus raised are well taken, the defendant will be entitled to judgment, notwithstanding the defects in the answer.⁵ So, under a statute which

makes a counter-claim in the answer a pleading to the complaint, if the latter discloses want of jurisdiction, or fails to state a cause of action, a demurrer to the counter-claim goes back to the complaint.⁶ So a demurrer to a reply to a cross-petition reaches the cross-petition.⁷ And since a bad reply is a good enough reply to an insufficient answer, a demurrer to such reply ought to be carried back and sustained to such answer.⁸ But the rule that a demurrer reaches the first defective pleading is subject, under the Code system, to the important qualification, that it is only an objection to the jurisdiction, or that the complaint or petition does not state facts sufficient to constitute a cause of action, that searches the record upon a demurrer to the answer.⁹ And it is held in Indiana, that a demurrer to a cross-complaint or counter-claim, for the want of sufficient facts therein, does not search the record, as would such demurrer to an answer, and fasten upon an insufficient complaint.¹⁰

1 Wyman v. Mitchell, 1 Cowen, 316; Utica Ins. Co. v. Scott, 8 Cowen, 709; Allen v. Crofoot, 7 Cowen, 46; Murdock v. Winter, 1 Har. & G. 471; Salt Lake City Bank v. Hendrickson, 40 N. J. L. 52.

2 Loomis v. Youle, 1 Minn. 175. See Sill v. Sill, 31 Kan. 243.

3 Anthony v. Halderman, 7 Kan. 61; Hunt v. Bridge Co. 11 Kan. 433; State v. Commissioners etc. 12 Kan. 437; Helzer v. Kelly, 73 Ind. 582; Dorrell v. Hannah, 80 Ind. 497; Brown v. Tucker, 7 Colo. 30.

4 Trott v. Sarchett, 10 Ohio St. 241; Smith v. Mulliken, 2 Minn. 319; Yoss v. De Freudenrich, 6 Minn. 95; Eaton v. North, 25 Wis. 514.

5 Clay County v. Simonsen, 1 Dakota, 403; 2 Dakota, 112; Pino v. Beckwith, 1 New Mexico, 19; People v. Booth, 32 N. Y. 397; Pardo v. Osgood, 2 Abb. Pr. N. S. 305; Matthews v. Steltz, 5 Civ. Proc. R. 335; Mosey v. Ford, 32 Hun, 446; Petersen v. Swan, 18 Jones & S. 46; Scott v. State, 89 Ind. 368; Kretsch v. Helm, 45 Ind. 438; Lytle v. Lytle, 37 Ind. 281; Menfee v. Clark, 35 Ind. 304.

6 Lawe v. Hyde, 39 Wis. 345.

7 Hillier v. Stewart, 26 Ohio St. 632.

8 Wilhite v. Hamrick, 92 Ind. 594; Brown v. Tucker, 7 Colo. 30. And see Reed v. Higgins, 86 Ind. 143; Hancock v. Fleming, 85 Ind. 571; Aetna Ins. Co. v. Baker, 71 Ind. 102; Standley v. Northw. Mut. Life Ins. Co. 95 Ind. 254; Halliday v. Noble, 1 Barb. 178.

9 Stratton v. Allen, 7 Minn. 502; Eaton v. North, 25 Wis. 514; Ferson v. Drew, 19 Wis. 225; Lawton v. Howe, 14 Wis. 241. See Morey v. Ford, 32 Hun, 446.

¹⁰ *Baldwin v. Fagan*, 83 Ind. 447; *Anderson Bulld. etc. Assoc. v. Thompson*, 88 Ind. 405. So a demurrer to an answer, which assigns no cause, raises no question whatever, and cannot be carried back and sustained to the complaint: *Hessin v. Heck*, 83 Ind. 449.

§ 113. **One good defense.** — It is an established principle, that a pleading which states facts entitling the pleader to some relief, although not to all demanded, is sufficient on demurrer.¹ Thus; a complaint or counterclaim which states facts showing that the pleader is entitled to some relief will repel a demurrer.² So, where it is objected that an answer does not contain facts sufficient to constitute a defense, if the answer contains any defense, the objection will be overruled.³ Or, if a general demurrer is filed to an answer containing several paragraphs, the demurrer should be overruled if any one paragraph presents a good defense;⁴ the court must pass upon the demurrer as an entirety, and cannot overrule it as to one paragraph and sustain it as to another.⁵ And a general demurrer, for want of facts sufficient to constitute a valid defense, will not be sustained when the facts in the answer, if well stated, would constitute a sufficient defense;⁶ it is the office of a motion, and not of a demurrer, to make a pleading more definite and certain.⁷ So a general demurrer to an answer, which contains new matter and a specific denial of certain allegations of the complaint or petition, should be overruled, if the allegations denied are material to the plaintiff's right to recover.⁸ So an answer, however defective it may be, is not demurrable, if the pleading it answers is radically insufficient to call for any answer whatever.⁹ The rule is, that a bad answer is good enough for a bad complaint, and the overruling of a demurrer thereto is not available error.¹⁰ But it is held in Indiana, that where the general denial is pleaded, there is no available error in sustaining a demurrer to an additional paragraph, which avers no

fact not admissible under the general denial.¹¹ And where a demurrer is sustained to a paragraph of answer, and it appears that all the material facts alleged therein could have been given in evidence under another paragraph of answer, which remains in the record, the error in sustaining such demurrer, if it be an error, is harmless, and will not authorize the reversal of the judgment.¹² If a paragraph of answer is addressed and limited to a part only of the complaint, and to that portion constitutes a good defense, there is no error in overruling a demurrer to such partial answer.¹³ Where an agreement to arbitrate was pleaded in abatement of an action, the sustaining of a demurrer thereto upon insufficient grounds stated, if error at all, was held to be error without prejudice, it appearing that the agreement was, for another reason, not binding between the parties.¹⁴ In an action upon two promissory notes, an answer purporting to bar the action, which at most only alleges matter in defense of one of the notes, is insufficient on demurrer.¹⁵ Generally speaking, a defense which is inartificially drawn, and which commingles denials and new matter, is not, for that reason, to be held bad on demurrer if, by a liberal construction, its allegations constitute a defense;¹⁶ and the sustaining of a general demurrer to the whole division of an answer, if some of the grounds of defense therein set forth are well stated, is erroneous.¹⁷

1 See *Stuyvesant v. Mayor etc.* 11 Paige, 415; *Wheeler v. Conn. Mut. Life Ins. Co.* 82 N. Y. 543; *Crecellus v. Mann*, 84 Ind. 147; § 44, *ante*.

2 *Teal v. Spangler*, 72 Ind. 380; *Bayless v. Glenn*, 72 Ind. 5; *Crecellus v. Mann*, 84 Ind. 147; *Hyde v. Supervisors*, 43 Wis. 129; *Potter v. Hussey*, 1 Utah, 249; *Cassidy v. Cassidy*, 63 Cal. 352.

3 *Caldwell v. Ruddy*, Sup. Ct. Idaho, 1 West C. Rep. 295; *Everett v. Waymire*, 30 Ohio St. 308; *State v. Williams*, 8 Tex. 255; *Armstrong v. Hinds*, 9 Minn. 356; *First Nat. Bank v. How*, 28 Minn. 150.

4 *Munn v. Taulman*, 1 Kan. 254; *Brace v. Benedict*, 31 Ark. 301; *Gregory v. Gregory*, 69 Ind. 345; *Nichols v. Nichols*, 96 Ind. 433; *Roberts v. Johannas*, 41 Wis. 616.

- 5 *Archer v. Nat. Ins. Co.* 2 Bush, 223.
- 6 *Everett v. Waymire*, 30 Ohio St. 303.
- 7 *Everett v. Waymire*, 30 Ohio St. 303; *Union Bank v. Bell*, 14 Ohio St. 200; *Simpson v. Prather*, 5 Oreg. 86; *Koons v. Carney*, 87 Ind. 34; *Cont. Life Ins. Co. v. Houser*, 89 Ind. 258; *Terrell v. Butterfield*, 92 Ind. 1; *Williamson v. Yingling*, 93 Ind. 42.
- 8 *Mansfield etc. R. R. Co. v. Hall*, 26 Ohio St. 310.
- 9 *Allen v. Malcolm*, 12 Abb. Pr. N. S. 335.
- 10 *State v. Emmons*, 83 Ind. 273.
- 11 *Phillip v. Aurora Lodge*, 87 Ind. 505; *State v. Roche*, 94 Ind. 372; *Flora v. Cline*, 89 Ind. 208; *Hamilton v. Browning*, 94 Ind. 242; *West v. West*, 89 Ind. 529. And see *Searcy v. State*, 93 Ind. 556; *Eve v. Louis*, 91 Ind. 457; *Rowe v. Major*, 93 Ind. 206; *Brown v. Harrison*, 93 Ind. 142.
- 12 *Darrell v. Hilligoss etc. Gravel Road Co.* 90 Ind. 284. And see *Moore v. Boyd*, 95 Ind. 134; *Cannon v. Krelpe*, 14 Kan. 324.
- 13 *Mattock v. Hawkins*, 92 Ind. 225.
- 14 *Childs v. Dobbins*, 61 Iowa, 103.
- 15 *Downey v. Lee*, 86 Ind. 200. And see *Traster v. Snelson*, 29 Ind. 96; *Richardson v. Hickman*, 23 Ind. 244; *Foster v. Hazen*, 12 Barb. 547.
- 16 *Rice v. O'Connor*, 10 Abb. Pr. 361. And see *Bishop v. Edmiston*, 16 Abb. Pr. 466; *Otero v. Bullard*, 3 Cal. 183.
- 17 *Zapple v. Rush*, 23 Iowa, 99.

§ 114. Where counter-claim is interposed.—A counter-claim to be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part.¹ It must consist in a set-off or a claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint or petition;² and an answer which does not meet these requirements is insufficient and subject to demurrer, whether regarded as a defense or a counter-claim.³ If the cause of action stated as a counter-claim be such that an action upon it could not be maintained by the defendant alone against the plaintiff alone, then it is not the subject of a counter-claim, and the question whether it is such a cause of action is properly raised by demurrer.⁴ And where the only ground of demurrer to an answer allowed by the statute is that it does not contain a defense or counter-claim, the objection to a counter-claim,

that it cannot be determined without the presence of other parties, may be raised upon such ground.⁵ But under such a provision of the statute, the ground that, in a counter-claim, two causes of action are improperly united, is untenable as ground for demurrer.⁶ Joining them in the same statement, instead of stating them separately, is properly remedied by motion, and not by demurrer;⁷ and if a counter-claim contains irrelevant, redundant, or indefinite matter, the remedy is by motion, not demurrer.⁸

1 *Prouty v. Eaton*, 41 Barb. 400; *Leavenworth v. Packer*, 52 Barb. 137; *Barnes v. McMullins*, 78 Mo. 239.

2 *Mattoon v. Baker*, 24 How. Pr. 327; *Clinton v. Eddy*, 37 How. Pr. 23; 54 Barb. 54; 1 Lans. 61; *Vassear v. Livingston*, 4 Duer, 286; 13 N. Y. 256.

3 *Mattoon v. Baker*, 24 How. Pr. 329; *Walker v. Johnson*, 28 Minn. 147; *Hammond v. Terry*, 3 Lans. 186. And see *Collins v. Suan*, 7 Robt. 94; *Westervelt v. Ackey*, 2 Hun, 253; 62 N. Y. 505.

4 *Campbell v. Jones*, 25 Minn. 155. See *Cragin v. Lovell*, 88 N. Y. 258; *Garrett v. Love*, 89 N. C. 205.

5 *Campbell v. Jones*, 25 Minn. 155. And see *Nat. State Bank v. Boylan*, 2 Abb. N. C. 216.

6 *Campbell v. Jones*, 25 Minn. 155. Under the California practice, demurrer will lie upon the ground that several causes of counter-claim have been improperly joined: Cal. Code Civ. Proc. § 44, subd. 1.

7 *Campbell v. Jones*, 25 Minn. 155.

8 *Currie v. Cowles*, 6 Bosw. 452; *Mattoon v. Baker*, 24 How. Pr. 329.

§ 115. *Instances of, sustained.*—To a defense insufficiently pleaded in the same paragraph with matter well pleaded;¹ to an answer professing to set up new matter, but not stating facts sufficient to constitute a defense;² to an answer which, conceding its truth, is still insufficient to entitle the defendant to judgment, because of the omission to plead other facts necessary to be proved by him;³ to an answer pleading a misjoinder of plaintiffs, apparent upon the face of the complaint;⁴ to an answer deficient in matter of substance, as by pleading the general issue, when it should state the grounds of

defense; or where special denials are substantially embraced in the general denial pleaded;⁶ to an answer that the defendant was civilly dead;⁷ to an answer in an action for assault, setting up that the parties are citizens of a foreign country, and that the acts complained of occurred there;⁸ to an answer of estoppel which fails to show that the plaintiff had knowledge of the facts constituting the estoppel, and which does show that the defendant had knowledge, or the means of knowledge, of all such facts;⁹ to an answer in bar of the whole action upon a bond, insufficient as to one of the breaches assigned;¹⁰ to an answer whose denial of "knowledge or information sufficient," etc., is evasive and improper;¹¹ to an answer by a surety on a promissory note, that the principal had delivered it in violation of an agreement made between them, that the latter would procure an additional surety, but not alleging notice of such agreement by the payee;¹² in a suit against partners upon a promissory note by the payee, to an answer by one that his co-partner, without his consent, executed the note in the firm name, of which the plaintiff, at the time, had notice;¹³ to an answer filed to the entire complaint, but only answering a part thereof;¹⁴ to an answer by way of set-off, which does not show that the defendant held the claim which he offers to set-off at the time the suit was commenced;¹⁵ in a suit upon a note and mortgage made to a foreign corporation for a loan of money, to an answer in abatement, that the corporation had not complied with the conditions of the statute imposing certain duties on such corporations, before transacting business in the State, it not appearing where the loan was made;¹⁶ to an answer where it shows a defense which is void under the statute of frauds;¹⁷ to a separate claim in an answer, setting forth "that if said promissory

note was executed as charged in said petition, it was executed beyond the limits of the State," as setting forth no defense to an action on a promissory note;¹⁸ to a plea, on the ground that it consists of matter of evidence or argument, and is neither in denial nor in confession and avoidance.¹⁹ Where each defense set forth in an answer is required to be stated in a separate paragraph and numbered, an answer not so separating distinct defenses is demurrable, but the demurrer must go to the whole answer, and not to a part.²⁰ Where the general issue was pleaded, and special pleas were also interposed setting up a defense available under the general issue, the sustaining of a demurrer to the special pleas was held to be no ground for reversal.²¹ A defense merely alleging that the plaintiff is not the real party in interest is demurrable, because it attempts to set up new matter which could not be proved unless specially pleaded, and states no fact, but only a conclusion of law.²²

1 *Williams v. Langford*, 15 Mon. B. 566.

2 *Fabricotti v. Launitz*, 3 Sand. 743; *Merritt v. Millard*, 5 Bosw. 645; *Childs v. Griswold*, 15 Iowa, 433. And see *Smith v. Greenin*, 2 Sand. 701.

3 *Nicoll v. Fash*, 59 Barb. 275.

4 *Petree v. Lansing*, 66 Barb. 357.

5 *Finch v. Finch*, 10 Ohio St. 501.

6 *Ensey v. Cleveland R. R. Co.* 10 Ind. 178.

7 *Freeman v. Frank*, 10 Abb. Pr. 370.

8 *De Witt v. Buchanan*, 54 Barb. 31.

9 *Buck v. Milford*, 90 Ind. 291. And see *Robbins v. Magee*, 76 Ind. 381; *Lash v. Rendell*, 72 Ind. 475.

10 *State v. Roche*, 94 Ind. 372. And see *Frazee v. Frazee*, 70 Ind. 411.

11 *State v. McGarry*, 21 Wis. 496.

12 *Whitcomb v. Miller*, 90 Ind. 384.

13 *Moffitt v. Roche*, 92 Ind. 96.

14 *Franklin Life Ins. Co. v. Dehority*, 89 Ind. 347; *Hancock v. Fleming*, 85 Ind. 571.

15 *Gregory v. Gregory*, 89 Ind. 345. And see *Welborn v. Coon*, 57 Ind. 270; *Harris v. Rivers*, 53 Ind. 218.

16 *Finch v. Travellers' Ins. Co.* 87 Ind. 302. And see *Wood v. Caldwell*, 54 Ind. 270; 23 Am. Rep. 641; *Daly v. Nat. Life Ins. Co.* 64 Ind. 1.

17 *Galway v. Shields*, 1 Mo. App. 546. A plea which sets forth a contract for the conveyance of land was held good on demurrer, though it did not aver that the contract was in writing, it not appearing in the plea that it was not in writing; *Tucker v. Edwards*, 7 Colo. 209. And see *Sweetland v. Barrett*, 4 Mont. 217.

18 *Munn v. Taulman*, 1 Kan. 254.

19 *Davenport etc. Co. v. Davenport*, 15 Iowa, 6. And see *Gerber v. Friday*, 87 Ind. 366.

20 *People v. Weber*, Dist. Ct. Colo. 3 Colo. L. R. 62.

21 *Colorado Cent. R. R. Co. v. Molandin*, 4 Colo. 154; *Colorado Cent. R. R. Co. v. Blake*, 3 Colo. 417.

22 *White v. Drake*, 3 Abb. N. C. 123; *Savage v. Fire Ins. Co.* 4 Bosw. 15, 16.

§ 116. **When it will not lie.**—Generally speaking, if the facts stated in an answer constitute a valid and sufficient defense, a demurrer will not lie.¹ A demurrer will not lie because of argumentativeness or surplusage;² nor because the allegations of an answer are hypothetical;³ nor to the want of verity in the allegations of an answer;⁴ nor because of mere uncertainty and want of precision in the statement of a defense, where the meaning cannot be mistaken;⁵ nor can the objection that an answer contains inconsistent defenses be made by demurrer.⁶ So where facts constituting a defense are stated in a pleading as matter of belief only, and not positively, an objection to this mode of statement cannot be raised by demurrer.⁷ An allegation in the answer, that the right of action is in a receiver named, and not in the plaintiff, is a proper defense, and is not demurrable.⁸ So where the facts alleged in the answer are sufficient to entitle the defendant to a recoupment of his damages, even if they are obscurely or vaguely set forth, the answer is not for that reason demurrable.⁹ So an answer to an action for seizing property under an attachment, that the suit in which the attachment was issued is still pending, is not demurrable, though the complaint in

the attachment suit was dismissed, if an appeal therefrom is pending undetermined.¹⁰ An answer containing irrelevant matter is not bad on demurrer, if there be alleged in it sufficient to constitute a valid defense to the action.¹¹ And if it be a ground of demurrer at all that statements contained in an answer are irrelevant, and have nothing to do with the matters alleged in the complaint, such statements must be pointed out specifically;¹² a demurrer to "so much of the answer as sets up the special contract" is not sufficiently specific, and will not be received.¹³ A denial of "all material allegations" is an answer good on demurrer, but it may be made more definite on motion.¹⁴ And the objection that the defendant has answered by denying knowledge or information sufficient to form a belief, where the facts alleged in the complaint, if true, must necessarily be known to him, cannot be made by demurrer to the answer, and can be urged on motion only.¹⁵

1 Bishop v. Edmiston, 16 Abb. Pr. 466; Loomis v. Youle, 1 Minn. 175.

2 School District v. Pratt, 17 Iowa, 10; Campbell v. Taylor, 3 Utah, 325; Roeder v. Ormsby, 13 Abb. Pr. 334; Judah v. Vincennes University, 23 Ind. 273; Isaacs v. Skrainka, 13 Mo. App. 593. But no available error is committed in sustaining a demurrer to an argumentative denial, when the general denial is on file: Hoke v. Applegate, 88 Ind. 530.

3 Taylor v. Richards, 9 Bosw. 679.

4 McGregor v. McGregor, 21 Iowa, 441.

5 Brookville etc. Turnp. Co. v. Pumphrey, 50 Ind. 78; 28 Am. Rep. 76; Koons v. Carney, 87 Ind. 34.

6 Caldwell v. Ruddy, Sup. Ct. Idaho, 1 West C. Rep. 235; Larimer v. Kelley, 10 Kan. 298. But see Urdias v. Morrell, 25 Cal. 31; Tucker v. Edwards, Sup. Ct. Colo. 3 Pacif. L. Rep. 233.

7 Stoutenburg v. Lybrand, 13 Ohio St. 223.

8 Townsend v. Norris, 2 N. Y. Week. Dig. 433.

9 Hammond v. Earle, 58 How. Pr. 426.

10 Peck v. Hotchkiss, 52 How. Pr. 226.

11 Watson v. Husson, 1 Duer, 242. And see Dovan v. Dinsmore, 33 Barb. 86; 20 How. Pr. 503.

12 Ormsby v. U. P. Rallw. Co. U. S. Cir. Ct. 1 Colo. L. R. 117. And see Jones v. Brunskill, 13 Iowa, 129; Babbitt v. Walters, 3 Iowa, 564; McDaniel v. Yuba, 14 Cal. 444.

13 Ormsby v. U. P. Railw. Co. U. S. Cir. Ct. 1 Colo. L. R. 117.

14 Lewis v. Coulter, 10 Ohio St. 451.

15 Ketchum v. Zerega, 1 Smith, E. D. 553.

§ 117. **Effect of.**— A demurrer to an answer brings the whole record before the court, and the court should render judgment on the demurrer against the party committing the first material error in his pleading.¹ If, on a demurrer to the answer, the complaint fails to state a cause of action, or shows that the court has no jurisdiction to render the relief sought, judgment should be rendered for the defendant.² And it seems that, upon demurrer to the answer, the court will consider the sufficiency of the complaint, although a prior demurrer interposed by the defendant to substantially the same complaint had been overruled, and no appeal taken.³ But demurrers to answers in abatement do not reach back to the complaint.⁴ If, on the argument, a demurrer to the answer is sustained, it is almost a matter of course to allow the defendant to serve an amended answer, upon such terms as are just.⁵ Where the court sustained a demurrer to part of an answer, and the defendant filed an amended answer which was also demurred to, it was held, that on the second demurrer the defendant must stand by his amended answer, which could not be aided by the parts of the first answer which were not demurred to.⁶ On a demurrer to an entire defense, it is error to sustain it as to part of the defense, and to strike out the remainder.⁷ But when an answer sets up several distinct defenses on demurrer, part may be held good and the others bad.⁸ On overruling a demurrer to an answer which does not go in bar of the whole cause of action, at most there should only be an interlocutory judgment, simply overruling the demurrer, to stand upon the record till the trial of all the issues, when final judgment on the whole case should

be entered.⁹ And upon overruling a demurrer to a counter-claim, no judgment should be entered until all the issues are disposed of.¹⁰ Upon overruling a demurrer to the answer, and the subsequent hearing of the cause upon the issues joined, the plaintiff is not concluded from showing the true and exact rights of the parties.¹¹ But a pleading interposed after demurrer overruled is a waiver of the demurrer,¹² and the party pleading over cannot avail himself of any error in the ruling of the court upon the demurrer.¹³ And where it appears by the record that a pleading was found to be untrue, on appeal the court will not consider whether there was error in overruling a demurrer to it.¹⁴ But when an answer is held bad on demurrer, the defendant does not waive his exceptions to the rulings on the demurrer by amending his answer, so as to set up new defenses, but such waiver follows only where the amendment is designed to supply an omission, or cure a defect, pointed out by the demurrer.¹⁵ By voluntarily replying to a paragraph of answer, while a demurrer is pending thereto, the demurrer is waived.¹⁶ In the trial of an issue of law raised upon demurrer to an answer, it is not necessary for the court to find, in its decision, the facts admitted in the pleading.¹⁷ Under the practice in Texas, the effect of a general demurrer is to put in question the sufficiency of the facts alleged, not the manner of stating such facts.¹⁸

1 Trott v. Sarchett, 10 Ohio St. 241; Babb v. Mackey, 19 Wis. 371; Martin v. McDonald, 14 Mon. B. 544; Bank of State v. Lockwood, 16 Ind. 306; Brown v. Tucker, 7 Colo. 30. And see § 112, *ante*.

2 Lawton v. Howe, 14 Wis. 241; Ferson v. Drew, 19 Wis. 225; Lockwood v. Bigelow, 11 Minn. 113; Scott v. State, 89 Ind. 363; People v. Booth, 32 N. Y. 397. And see Morey v. Ford, 32 Hun, 446.

3 Parsons v. Hayes, 14 Abb. N. C. 419.

4 Price v. Grand Rapids etc. R. R. Co. 18 Ind. 137; Ewen v. Hussey, 23 Ind. 395.

5 See N. Y. Code Civ. Proc. § 497; Cooper v. Jones, 4 Sand. 699; White v. Mayor etc. 5 Abb. Pr. 322; 14 How. Pr. 495. After a de-

murrer is sustained to an answer the defendant is practically out of the case, and his objections to the subsequent proceedings cannot be considered: *Ramsey v. Flournoy*, 56 Cal. 260.

- 6 *Becker v. Sandusky etc. Bank*, 1 Minn. 311.
- 7 *Armstrong v. Hinds*, 9 Minn. 356.
- 8 *Skinner v. Chicago etc. R. R. Co.* 12 Iowa, 191.
- 9 *Brevoort v. Brevoort*, 8 Jones & S. 211. See *Murphy v. Allerton*, 7 Hun, 650.
- 10 *Bucking v. Hauselt*, 9 Hun, 633.
- 11 *Standish v. Dow*, 21 Iowa, 363.
- 12 *Green v. Taney*, Sup. Ct. Colo. 3 Pacif. L. Rep. 423; *Petty v. Trustees etc.* 95 Ind. 278; *Tootle v. Phonex Ins. Co.* 62 Iowa, 362; *Dorrington v. Minnick*, 15 Neb. 307.
- 13 *Young v. Martin*, 3 Utah, 484. And see § , *ante*.
- 14 *State etc. v. Julian*, 83 Ind. 292; *Bartlett v. Pittsburgh etc. Railway Co.* 94 Ind. 281.
- 15 *Ingham v. Dudley*, 60 Iowa, 16. See *Dickson v. Rose*, 87 Ind. 103. Where a demurrer was interposed to a counter-claim as set up in one paragraph of the answer, it was held that the defendant did not waive his exception to the ruling by afterwards filing an amendment to another paragraph of his answer, in which amendment there was no reference to the counter-claim: *Folsom v. Winch*, 62 Iowa, 477.
- 16 *Robertson v. Huffman*, 92 Ind. 247.
- 17 *Dickinson v. Kinney*, 5 Minn. 409.
- 18 *Robinson v. Davenport*, 40 Tex. 333. And see *Williams v. Warren*, 28 Tex. 610; *Moreland v. Atchison*, 34 Tex. 351. *Frosh v. Swett*, 2 Tex. 485, 487.

§ 118. As an admission of facts pleaded.—It is a general rule, that a party relying upon his demurrer to a pleading thereby admits the material facts averred, and must take all the consequences which result from such admission.¹ But a demurrer admits the truth of the facts stated in the pleading demurred to, for the purpose only of testing their legal sufficiency.² Its effect is to admit that the facts stated are true, but to deny that such facts give any right of action, or constitute a valid defense.³ Thus, in an action of claim and delivery for a horse, where the answer alleges a lien upon it, a demurrer to the answer does not admit the lien, but merely admits the facts set out in the answer, denying their sufficiency in law.⁴ So a demurrer to a pleading admits only such allegations thereof as are properly or well pleaded;⁵ inferences or conclusions

of law are, therefore, not so admitted ;⁶ and allegations which are impertinent or immaterial are not confessed by a demurrer.⁷ And when the allegations of an answer are contradictory, a demurrer only admits those allegations which the law adjudges to be true.⁸ An averment that a municipal body had power to make a mortgage is an averment of a conclusion of law, and not of a fact, and is not admitted by a demurrer.⁹ So a demurrer never confesses an allegation which it appears upon the face of the pleadings that the pleader is estopped to make ;¹⁰ therefore, by demurring to an answer which alleged that the plaintiff's tax deed was invalid because the sale for taxes was made without advertisement, the plaintiff was held not to admit the allegation, since the defendant was estopped to set up such defense.¹¹ Matters of which the court takes notice, as the enactment of public statutes, cannot be conclusively admitted by demurrer.¹² But it is held that a demurrer admits the terms of a foreign law as alleged in the pleading demurred to.¹³

1 *People v. Weston*, 3 Neb. 312 ; *Hauce v. Hair*, 25 Ohio St. 349 ; *Jouett v. Jouett*, 3 Tex. 150. See *Meyendorf v. Frohner*, 3 Mont. 222, 342.

2 *Chambers v. Miller*, 9 Tex. 236 ; *Perry v. Rice*, 10 Tex. 367 ; *Bush v. Madeira*, 14 Mon. B. 212.

3 *Zacharie v. Byran*, 3 Tex. 274.

4 *Mauney v. Ingram*, 78 N. C. 96.

5 *Catlin v. Glover*, 4 Tex. 151 ; *Freeman v. Hart*, 61 Iowa, 525 ; *Dawson v. Dawson*, 25 Ohio St. 449 ; *Faurot v. Neff*, 32 Ohio St. 46 ; *Smith v. Henry*, 15 Iowa, 385 ; *Lane v. Ready*, 12 Ind. 475.

6 *Hall v. Bartlett*, 9 Barb. 297 ; *Griggs v. St. Paul*, 9 Minn. 246 ; *Holman v. Criswell*, 13 Tex. 44 ; *Hamilton etc. Hydraulic Co. v. Railroad Co.* 29 Ohio St. 345 ; *Peterson v. Roach*, 32 Ohio St. 374 ; *Railway Co. v. Moore*, 33 Ohio St. 394 ; *Freeman v. Hart*, 61 Iowa, 525.

7 *Platter v. City of Seymour*, 86 Ind. 323 ; *Petty v. Trustees etc.* 95 Ind. 273 ; *Peyton v. Kruger*, 77 Ind. 486.

8 *Freeman v. Frank*, 10 Abb. Pr. 370. And see *Peterson v. Roach*, 32 Ohio St. 374.

9 *Branham v. San Jose*, 24 Cal. 585.

10 *Gould Plead.* p. 470, ‡ 25.

11 *Scofield v. McDowell*, 47 Iowa, 129.

12 *Attorney-General v. Foote*, 11 Wis. 14.

13 *Armendiaz v. Serna*, 40 Tex. 291.

CHAPTER VIII.

PLEADING IN PARTICULAR CASES.

- { 119. Abandonment and forfeiture.
- { 120. Account — Account stated.
- { 121. Accounting.
- { 122. Agency.
- { 123. Bills and notes — Complaint.
- { 124. Bills and notes — Answer.
- { 125. Bill of particulars.
- { 126. Bill of particulars — Form, contents, etc.
- { 127. Bonds and undertakings — Complaint.
- { 128. Bonds and undertakings — Answer.
- { 129. Breach of promise to marry — Complaint.
- { 130. Breach of promise to marry — Answer.
- { 131. Civil Damage Act.
- { 132. Claim and delivery — Replevin.
- { 133. Common carrier.
- { 134. Conspiracy.
- { 135. Contracts.
- { 136. Conversion — Complaint.
- { 137. Conversion — Answer.
- { 138. Corporations — Complaint.
- { 139. Corporations — Answer.
- { 140. Damages.
- { 141. Divorce — Complaint.
- { 142. Divorce — Answer.
- { 143. Executors and administrators.
- { 144. Foreclosure — Complaint.
- { 145. Foreclosure — Answer.
- { 146. Forcible entry and detainer.
- { 147. Fraud — Complaint.
- { 148. Fraud — Answer.
- { 149. Fraudulent conveyances.
- { 150. Goods sold and delivered.
- { 151. Guaranty.
- { 152. Husband and wife.
- { 153. Injunction.
- { 154. Innkeeper.
- { 155. Insurance — Fire.
- { 156. Insurance — Life.

- § 157. Insurance — Marine.
- § 158. Insurance — Answer.
- § 159. Interpleader.
- § 159 a. Intervention.
- § 160. Judgments — Complaint.
- § 161. Judgments — Answer.
- § 162. Landlord and tenant.
- § 163. Libel and slander — Complaint.
- § 164. Libel and slander — Answer.
- § 165. Lien, mechanic's — Complaint.
- § 166. Lien, mechanic's — Answer.
- § 167. Malicious prosecution — Complaint.
- § 168. Malicious prosecution — Answer.
- § 169. Master and servant.
- § 170. Mistake.
- § 171. Money had and received, etc.
- § 172. Municipal corporations — Complaint.
- § 173. Municipal corporations — Answer.
- § 174. Negligence — Complaint.
- § 175. Negligence — Answer.
- § 176. Nuisance.
- § 177. Officers.
- § 178. Partition.
- § 179. Partnership — Complaint.
- § 180. Partnership — Answer.
- § 181. Penalties.
- § 182. Physician and surgeon.
- § 183. Pledge.
- § 184. Possession of land — Complaint.
- § 185. Possession of land — Answer.
- § 186. Quieting title — Complaint.
- § 187. Quieting title — Answer.
- § 188. *Quo warranto*.
- § 189. Railroads — Injury to animals.
- § 190. Receivers.
- § 191. Recognizance.
- § 192. Redemption.
- § 193. Reformation of instrument.
- § 194. Rescission and cancellation.
- § 195. Services — Complaint.
- § 196. Services — Answer.
- § 197. Services — Loss of.
- § 198. Sheriffs — Complaint.
- § 199. Sheriffs — Answer.

- § 200. Slander — Of title.
- § 201. Specific performance — Complaint.
- § 202. Specific performance — Answer.
- § 203. Subscriptions.
- § 204. Sureties — Complaint.
- § 205. Sureties — Answer.
- § 206. Taxes — Taxation.
- § 207. Trespass — Complaint.
- § 208. Trespass — Answer.
- § 209. Trusts.
- § 210. Vendor and purchaser.
- § 211. Waste.
- § 212. Wills.
- § 213. Written instrument.

§ 119. **Abandonment and forfeiture.** — It is an established rule under the Code system of pleading, that a party need not allege in his pleading more than will constitute *prima facie* a cause of action or defense, and that all beyond this is surplusage.¹ It is therefore held that, in an action by an adverse claimant against an applicant for a patent to quiet title to a mining claim, which appeared to have been a re-location of another claim formerly held by the defendant, a complaint which contains a general allegation of ownership and possession in the plaintiff is sufficient, although the facts constituting an alleged abandonment and forfeiture by the defendant are not pleaded.² Where a pleading seeks to set up an abandonment and forfeiture by a railroad company of all its rights, privileges, and franchises, by reason of its failure to perform certain acts prescribed by statute, but does not allege that the forfeiture had been judicially declared in a suit for that purpose at the instance of the State, it is bad.³ A forfeiture of corporate rights, not judicially declared in a direct proceeding for that purpose, cannot be taken advantage of collaterally.⁴

¹ See *Campbell v. Taylor*, 3 Utah, 225; *Farnsworth v. Holderman*, 3 Utah, 381; *Price v. Brown*, 10 Abb. N. C. 67; *Piercy v. Sabin*, 10 Cal. 28; *Green v. Palmer*, 15 Cal. 414; *Harris v. Hillegass*, 54 Cal. 463.

2 *Campbell v. Taylor*, 3 Utah, 325.

3 *Logan v. Railroad Co.* 90 Ind. 552.

4 *Trustees etc. v. Hills*, 6 Cowen, 23; 16 Am. Dec. 429; *John v. Farmers' etc. Bank*, 2 Blackf. 267; 20 Am. Dec. 119; *White v. State*, 69 Ind. 273; *Logan v. Railroad Co.* 90 Ind. 532.

§ 120. **Account—Account stated.**—An account is defined to be a detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation.¹ As generally employed, the word applies to transactions between persons, in which, by sale upon the one side, and purchase upon the other, the relation of debtor and creditor is created by general course of dealing, and it does not apply to one or more isolated transactions resting upon special contract.² And it is held that, if the complaint counts only on a balance due upon an open, mutual, and current account, the plaintiff cannot recover a sum due on a special contract relating to a matter not included in the mutual account.³ The term "open account" is used in opposition to a "stated account," wherein an account is closed by an assent to its correctness by the party charged.⁴ To constitute an account, it is not necessary that the items be entered in an account book, provided they are such as usually form the subject of book account;⁵ and the items of the account need not be all of the same class.⁶ Nor is it necessary for a party to set forth, in a pleading, the items of an account therein alleged, but he must deliver to the adverse party, after a written demand thereof, a copy of the account, and if he fails so to do, he is precluded from giving evidence of the account.⁷ It is a sufficient giving "a copy of the account," to set down in writing in the form of an account the items thereof, and file it with the complaint or petition, without having previously made any entries in an account book.⁸ And a complaint in an action on an account, averring

that the defendant is indebted to the plaintiff upon it, referring to a bill of particulars filed, which then follows with "leaving due and unpaid" a specified sum, sufficiently shows that the account is due and unpaid.⁹ If several accounts against one as executor, guardian, and trustee are all so united that they cannot be conveniently separated, they may be set up in the same complaint, and that the several causes are so combined is not a good ground of demurrer.¹⁰ In an action on an account, a copy of which was attached to and made a part of the petition, there being, however, no assignment of the account sued on to the plaintiff, nor allegation showing ownership in him, it was held that the petition would not support a judgment in the plaintiff's favor.¹¹ In order to maintain an action upon an account stated, it must appear that the account has been balanced and rendered, with an assent on the part of the defendant, either express or implied, to the balance;¹² and if such assent is not proved, the complaint will be dismissed, unless amended, although there be some evidence of indebtedness.¹³ To enable a plaintiff to recover, as upon an account stated, upon written statements or accounts made out and rendered by the defendant, he must declare upon them as such; and if in his complaint he sets out the original transactions, and not the account stated, as the grounds of his action, either party may prove what the original transactions were.¹⁴ An averment that one party made a statement of account which he delivered to the other, who made no objections to it, is not an averment that an account was stated between them, but at most is only evidence tending to show one.¹⁵

1 *Stringham v. Board of Supervisors*, 24 Wis. 534. See *Seaman v. Low*, 4 Bosw. 337; *Dowdney v. Volkening*, 5 Jones & S. 313.

2 *McCamant v. Batsell*, 59 Tex. 363.

3 *Hopkins v. Orcutt*, 51 Cal. 357.

4 *McCamant v. Batsell*, 59 Tex. 363. And see *Trapnall v. Hill*, 31 Ark. 345; *Quincey v. White*, 63 N. Y. 370; *Avery v. Leach*, 9 Hun, 139; *Seymour v. Marvin*, 11 Barb. 80; *Toland v. Sprague*, 12 Peters, 335; *Wiggins v. Burkham*, 10 Wall. 129; *Robson v. Bohn*, 22 Minn. 410.

5 *Black v. Chesser*, 12 Ohio St. 621.

6 *Dudley v. Geauga Iron Co.* 13 Ohio St. 168; *Ballas v. Ferneau*, 25 Ohio St. 635; *Ralston v. Kohl*, 30 Ohio St. 92.

7 See N. Y. Code Civ. Proc. § 531; Cal. Code Civ. Proc. § 454; N. C. Code Civ. Proc. § 118; *Johnson v. Mallory*, 2 Robt. 681; *Barkley v. Railroad Co.* 15 N. Y. Week. Dig. 314; *McKinney v. McKinney*, 12 How. Pr. 22; *Fullerton v. Gaylord*, 7 Robt. 551; *Collingwood v. Merchants' Bank*, 15 Neb. 118.

8 *Black v. Chesser*, 12 Ohio St. 621.

9 *Gordon v. Gordon*, 96 Ind. 134; *Mayes v. Goldsmith*, 58 Ind. 94. And see *De Witt v. Porter*, 13 Cal. 171.

10 *Oliver v. Wiley*, 75 N. C. 320.

11 *Thompson v. Stetson*, 15 Neb. 112.

12 *Volkening v. Degraaf*, 81 N. Y. 263; 12 *Jones & S.* 424.

13 *Volkening v. Degraaf*, 81 N. Y. 263; 12 *Jones & S.* 424. And see *Stenton v. Jerome*, 54 N. Y. 430; *Bernard v. Sellman*, 54 N. Y. 661; *Lockwood v. Thorne*, 18 N. Y. 285.

14 *Northern Line Packet Co. v. Platt*, 22 Minn. 413.

15 *Emery v. Pease*, 20 N. Y. 62.

‡ 121. **Accounting.**—In an action for an accounting, the general rule is, that all persons who are interested in the accounting should be made parties,¹ although their interests do not accrue in the same right.² But in such an action, between numerous parties, embracing many and complicated transactions, it is not desirable and is scarcely possible, that all the claims of the parties, in respect to the various items necessary to be passed upon and adjudicated in settling an account between them, should be made matter of distinct averment in the pleadings.³ Nor is it necessary, to entitle a party to an accounting and to the benefits of the accounting, that he should set out a detailed history of his adversary's dealings.⁴ Thus, if a partner being without fault can show that his adversary has violated the terms of the partnership contract, and abused the trust with which, as a partner, he was clothed, and that he has partnership assets which he has not accounted for, this

entitles such partner to an accounting.⁵ And the complaint or petition is not demurrable because it does not, in terms, allege that the defendant had possession of any of the partnership property, or that he had any accounts to render.⁶ And in a suit between partners for a dissolution and an accounting, it is enough to state the gross amount due to the plaintiff, without stating the items of the account ;⁷ nor need the complaint aver either the amount put in or taken out by either partner, these being incidental matters to be ascertained by the proof.⁸ But a partner who sues his associate for an accounting must aver and prove, if denied, an indebtedness, or at least a probable indebtedness.⁹ In an action against an agent for not accounting, etc., a request to account and pay over must be alleged in the complaint, and proved at the trial.¹⁰ In an action against agents to compel an accounting, under their contract to sell on commission and render their accounts periodically, the complaint is not to be regarded as setting up separate causes of action, because it alleges different transactions, and among them, misappropriation of moneys.¹¹ Where a complaint in an action for a dissolution and accounting alleges a partnership with the defendant, and the answer is a general denial, and the court finds that no partnership existed, but that the plaintiff had made various advances for legal interest and a share of the profits, it is error to decree an accounting.¹² A complaint in an action for an accounting touching the affairs, rents, and proceeds of a water ditch, and for a sale of the property and a division of the proceeds, which first avers in general terms a partnership between the plaintiff and defendants in the ditch, without averring any partnership agreement, and then states that the plaintiff acquired his interest in the ditch by the purchase of an undivided interest from other persons than the de-

fendants, does not state facts sufficient to constitute a cause of action, either for a dissolution and settlement of the affairs of a partnership, or for a partition.¹³ In an action against a trustee for an accounting, it should plainly appear from the complaint that no account within a reasonable time had been previously rendered, and it is not sufficient to show that the trustee had refused a demand for an account;¹⁴ but it is not proper in such action to set up in the complaint a former accounting alleged to be collusive, and which, therefore, the plaintiff seeks to avoid.¹⁵ A former accounting to be effectual as a bar to an action for an account must be pleaded.¹⁶ So the right of the defendant to an accounting must be specifically pleaded, in order to be available as a ground of affirmative relief.¹⁷ In an action for an accounting against a trustee, the fact that the trustee has accounted under a previous judgment, in an action by a beneficiary for himself and all others who might come in, will not be a bar, if the plaintiff shows that such judgment was collusive, and in fraud of his rights.¹⁸

1 *Petrie v. Petrie*, 7 Lans. 90; *Fisher v. Hubbell*, 7 Lans. 481; 65 Barb. 74; *Silsbee v. Smith*, 41 How. Pr. 418; 60 Barb. 372; *Petree v. Lansing*, 66 Barb. 357; *Southall v. Shields*, 81 N. C. 23.

2 *Littell v. Sayre*, 7 Hun, 485; *Skidmore v. Collier*, 8 Hun, 50.

3 *Babcock v. Camp*, 12 Ohio St. 11.

4 *Holladay v. Elliott*, 3 Oreg. 340.

5 *Holladay v. Elliott*, 3 Oreg. 340. And see *Babcock v. Hermance*, 48 N. Y. 683; *Davis v. Grove*, 2 Robt. 134, 635; *Ludington v. Taft*, 10 Barb. 447; *Haines v. Hollister*, 64 N. Y. 1.

6 *Carlin v. Donegan*, 15 Kan. 495. See *Kuehnemundt v. Haar*, 14 Jones & S. 183; *Ludington v. Taft*, 10 Barb. 447.

7 *Kimble v. Seal*, 92 Ind. 278. See *West v. Brewster*, 1 Duer, 647.

8 *Kimble v. Seal*, 92 Ind. 278.

9 *Hunt v. Gordon*, 52 Miss. 194.

10 *Bushnell v. McCauley*, 7 Cal. 421.

11 *Walker v. Spencer*, 13 Jones & S. 71.

12 *Arnold v. Angell*, 62 N. Y. 508. And see *Hollister v. Englehart*, 11 Hun, 446.

13 *Bradley v. Harkness*, 26 Cal. 63.

14 *Magauran v. Tiffany*, 62 How. Pr. 251.

15 *Kerr v. Blodgett*, 25 How. Pr. 303; 16 Abb. Pr. 137.

16 *Derby v. Yale*, 13 Hun, 273.

17 *Bailey v. Bergen*, 4 Thomp. & C. 642.

18 *Kerr v. Blodgett*, 25 How. Pr. 303; 16 Abb. Pr. 137.

§ 122. **Agency.**—If an agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself as agent or not, or whether the principal be known or unknown, the latter may be made liable, and will be entitled to sue thereon in all cases.¹ And in a suit thereon, the contract is admissible in evidence under an allegation that the plaintiff, by an instrument made by his agent, contracted with the defendant.² And in an action upon such contract by a third person, against the principal, the plaintiff may aver that the principal entered into the contract.³ Thus, in a suit upon a promissory note, whether made by the defendant himself or by his agent, the complaint or petition should charge that the defendant made the note, and this charge would be sustained by proof that the signature was by the defendant personally, or by his duly authorized agent.⁴ And the fact that the name of the defendant did not appear upon the face of the note would not prevent the plaintiff from introducing evidence to show that he was bound thereby.⁵ When a person assumes to act as the agent of another, he impliedly warrants that he has authority to so act.⁶ And if a person without authority assumes to contract in the name of another, he does not thereby become personally liable on the contract, and the only remedy the person contracted with has against him is an action for deceit in case he has acted fraudulently,⁷ or if there were no fraud therein, by an action for the breach of the warranty of authority;⁸ and a complaint stating all

the facts will be sufficient to support a recovery, although the warranty be not specifically stated as the basis of the claim.⁹ Where, in an action to recover for services rendered to a county, the plaintiff alleged that he was employed by the county, through an agent, this was held to be a sufficient allegation of employment by the county, and that it was not necessary to aver the agent's authority.¹⁰

1 Nicoll v. Burke, 78 N. Y. 590; 8 Abb. N. C. 213; Briggs v. Partidge, 64 N. Y. 357. See Schaeffer v. Henkel, 7 Abb. N. C. 1, 12, n.

2 Nicoll v. Burke, 78 N. Y. 590; 8 Abb. N. C. 213.

3 See Slevin v. Reppy, 46 Mo. 606; Cochran v. Goodman, 3 Cal. 244.

4 Slevin v. Reppy, 46 Mo. 606. And see Abeel v. Harrington, 18 Kan. 243.

5 Moore v. McClure, 8 Hun, 557.

6 Noe v. Gregory, 7 Daly, 233.

7 Noe v. Gregory, 7 Daly, 233.

8 Noe v. Gregory, 7 Daly, 233; Baltzen v. Nicolay, 53 N. Y. 467; Dung v. Parker, 52 N. Y. 404; White v. Madison, 26 N. Y. 117.

9 White v. Madison, 26 N. Y. 117.

10 Call v. Hamilton County, 62 Iowa, 448.

§ 123. Bills and notes.—Complaint.—A promissory note or bill of exchange imports a legal consideration, *prima facie*, and in an action thereon it is not necessary to aver the consideration in the complaint or petition.¹ A description of the note or bill is sufficient, without an averment of the consideration;² and the omission of the words "for value received" is not material.³ In a complaint upon a promissory note, an allegation of its non-payment is material, and if omitted the complaint is demurrable.⁴ But a complaint on a promissory note, which avers its execution and gives a copy of the note, need not otherwise show a promise to pay;⁵ and the fact that the allegation of indebtedness or the demand for judgment does not state that it is *upon the note*, does not make the complaint demurrable.⁶ An allegation in the complaint that no "part of said note, principal, or

interest has been paid" is a sufficient averment of a breach.⁷ An averment that the defendant made and executed his note, whereby he promised, etc., sufficiently avers delivery, and a further averment that after its execution the note was left in the maker's hands does not rebut the inference of delivery.⁸ An allegation that the payee of the note sued on indorsed it to the plaintiff, by writing his name on the back thereof, is a sufficient averment of ownership;⁹ and in such an action it is not necessary to allege or prove a consideration for the indorsement.¹⁰ If the complaint sets forth a copy of the note, it need not allege that the defendants made the note, nor show how they are connected with it.¹¹ As against an indorser, an averment that the note was presented to the maker at maturity for payment, and payment thereof demanded, but the same was not paid, of all which due notice was given to the indorser, is a sufficient averment of presentment, refusal, and notice.¹² But averment of due protest is not equivalent to an allegation of notice.¹³ When the plaintiff alleges presentment and notice of dishonor, he is not permitted to prove that the defendant waived such conditions, in the absence of proper averments of a waiver.¹⁴ An averment of due notice will not be sustained by evidence of facts excusing notice.¹⁵ A complaint by an assignee against the maker of a promissory note need not exhibit a copy of the indorsement.¹⁶ But in a suit by the first indorser against the second, it is incumbent upon the plaintiff to allege the special circumstances charging the defendant, and it is not enough to set out the note, averring that the defendant indorsed at the time of making the note.¹⁷ In an action by the heirs at law of a decedent, upon a promissory note payable to him, the complaint must allege every fact necessary to give the heirs a right of action, and to show

that they are entitled to the money.¹⁸ A complaint on a bill of exchange, drawn under a promise to accept such bill when drawn, need not aver an acceptance, and a complaint which avers the promise to accept, and the refusal, is sufficient.¹⁹ An action may be maintained upon a promissory note which has been destroyed, and where a copy of the note is given with or made part of the complaint or petition, the destruction of the note need not be averred.²⁰ And such action may be maintained without the plaintiffs giving the indemnity required in an action upon a lost note.²¹ A complaint on a promissory note which fails to allege any payee is bad on demurrer.²² Under the Colorado Code, the time of execution of the note sued upon is a traversable fact, and must be stated in the complaint.²³ An allegation that the note sued on "was indorsed and assigned by the payee to the plaintiff" is held equivalent to an allegation that the note was assigned by indorsement thereon in writing.²⁴ An allegation that a business corporation, for value received, made and delivered a promissory note, sufficiently states a valid contract, and it may be presumed, upon demurrer, that it was for a purpose within the general powers of the corporation.²⁵ The complaint in an action by the payee of a non-negotiable note, against one indorsing it before delivery, must allege that the defendant indorsed it with intent to become liable thereon, either as maker or guarantor.²⁶ In an action upon a note, if there be a variance between the description of the note in the complaint and the copy thereof filed with the complaint, the latter is presumed to be correct.²⁷

1 Underhill v. Phillips, 10 Hun, 591; Durland v. Pitcairn, 51 Ind. 426; Keesling v. Watson, 91 Ind. 579; Winters v. Rush, 34 Cal. 138; Alden v. Carpenter, 7 Colo. 92; Lindell v. Rokes, 60 Mo. 249. And see § 19, *ante*.

2 Underhill v. Phillips, 10 Hun, 591.

3 Kimball v. Huntington, 10 Wend. 675; Underhill v. Phillips, 10 Hun, 591; Jeffries v. Hager, 18 Mo. 272; Taylor v. Newman, 77 Mo. 237.

4 *Frisch v. Caler*, 21 Cal. 71; *Davanay v. Eggenhoff*, 43 Cal. 395. Compare *Keteltas v. Myers*, 19 N. Y. 231.

5 *Reynolds v. Baldwin*, 93 Ind. 57.

6 *Smith v. Fellows*, 26 Hun, 384; 14 N. Y. Week. Dig. 151.

7 *Jones v. Frost*, 28 Cal. 245.

8 *Wochoska v. Wochoska*, 45 Wis. 423. And see *Ricketts v. Harvey*, 78 Ind. 152; *Keesling v. Watson*, 91 Ind. 580; *Wulseimer v. Sells*, 87 Ind. 71.

9 *Rubelman v. McNichol*, 13 Mo. App. 584. And see *Keller v. Williams*, 49 Mo. 504; *Simpkins v. Smith*, 94 Ind. 470; *Keteltas v. Myers*, 19 N. Y. 231; *Farmers' etc. Bank v. Wadsworth*, 24 N. Y. 547; *Mechanics' Bank v. Stratton*, 36 How. Pr. 190; 5 Abb. Pr. N. S. 12; *Jaeger v. Hartman*, 13 Minn. 55. Compare *Montague v. Reineger*, 11 Iowa, 503. In an action by two executors upon a promissory note, given to one in settlement of a debt due from the maker to the estate of the decedent, it is not necessary to allege that the note was indorsed to them, if it be alleged that they are owners: *Leland v. Manning*, 4 Hun, 7.

10 *Rubelman v. McNichol*, 13 Mo. App. 584.

11 *Butchers' etc. Bank v. Jackson*, 15 Abb. Pr. 218; *Ferner v. Williams*, 37 Barb. 9; 14 Abb. Pr. 215; *Hill v. Place*, 7 Robt. 389; 5 Abb. Pr. N. S. 13; 36 How. Pr. 28.

12 *Young v. Miller*, 63 Cal. 302; *Fisk v. Miller*, 63 Cal. 367; *Spencer v. Rogers' Locomotive Works*, 8 Barb. 612; 17 Abb. Pr. 110. And see *Conkling v. Gandall*, 1 Keyes, 228; 1 Abb. Ct. App. 423; *Adams v. Sherrill*, 14 How. Pr. 297; *Wyckoff v. Andrews*, 5 Civ. Proc. R. 410; *Chemical Nat. Bank v. Carpentier*, 9 Abb. N. C. 301; *First Nat. Bank v. Hatch*, 78 Mo. 13.

13 *Price v. McClare*, 5 Duer, 670; 3 Abb. Pr. 253; *Cook v. Warren*, 88 N. Y. 37. Compare *Baldwin v. Doying*, 5 Civ. Proc. R. 300.

14 *Pier v. Heinrichoffen*, 52 Mo. 333; *First Nat. Bank v. Hatch*, 78 Mo. 13. See *Wyckoff v. Andrews*, 5 Civ. Proc. R. 410; *Clift v. Rodger*, 25 Hun, 29.

15 *Garrey v. Fowler*, 4 Sand. 665; *Holmes v. Holmes*, 12 Barb. 137; 7 N. Y. 525.

16 *Keith v. Champer*, 69 Ind. 477; *Kline v. Spahr*, 56 Ind. 296; *For-dyce v. Nelson*, 81 Ind. 447.

17 *Woodruff v. Leonard*, 1 Hun, 632. And see *Moore v. Cross*, 19 N. Y. 227; *Bacon v. Burnham*, 37 N. Y. 614; *Cowley v. Costello*, 15 Hun, 303; *Meyer v. Hibsher*, 47 N. Y. 265.

18 *Williams v. Riley*, 88 Ind. 294.

19 *Molson's Bank v. Howard*, 8 Jones & S. 15; *Barney v. Worthington*, 4 Abb. Pr. N. S. 205; 37 N. Y. 112.

20 *Sargent v. Railroad Co.* 32 Ohio St. 449. And see *Duckwall v. Weaver*, 2 Ohio, 13. That the rule of pleading is different where a negotiable note properly indorsed is lost: See *McClusky v. Gerhauser*, 2 Nev. 47. Compare *Keithler v. Seydell*, 60 Tex. 78.

21 *Des Artes v. Leggett*, 5 Duer, 156; 16 N. Y. 532. See as to indemnity required in an action on a lost note: *Smith v. Young*, 2 Barb. 545; *Brookman v. Metcalf*, 4 Robt. 568; *Wright v. Wright*, 54 N. Y. 437; *Frank v. Vessels*, 64 N. Y. 155; *Randolph v. Harris*, 28 Cal. 561; *Blandin v. Wade*, 20 Kan. 251.

22 *Timmons v. Wiggins*, 78 Ind. 297.

23 *Manning v. Haas*, 5 Colo. 37.

24 *Hill v. Shalter*, 73 Ind. 459.

25 *Lindsley v. Simonds*, 2 Abb. Pr. N. S. 60. And see *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Mechanics' Bank Assoc. v. Spring Valley etc. Co.* 25 Barb. 419.

26 *Cowley v. Costello*, 15 Hun, 303. And see *Smith v. Smith*, 5 Jones & S. 203.

27 *Carper v. Gaar*, 70 Ind. 212. The copy will be presumed to be right until the contrary is shown: *Stafford v. Davidson*, 47 Ind. 319; *Crandall v. First Nat. Bank*, 61 Ind. 349.

§ 124. **Bills and notes — Answer.** — In an action upon a promissory note, a general answer of no consideration is held to be good.¹ But a general answer of failure of consideration is bad, and such failure must be specifically pleaded.² And under the Colorado practice, in an action on a promissory note, it is proper to plead the want of consideration by specific averment, and in such case an issue is formed without a reply.³ An answer averring that, for a good consideration, an agreement for renewal and extension of the note sued upon had been made, is good, though it does not allege it to have been made in writing.⁴ An answer averring that the note sued on was obtained by fraud, misrepresentation, and covin, without specifically setting forth the facts constituting the fraud, presents an issuable fact, and a reply must be made to it.⁵ Evidence showing that a note has been altered after execution is admissible under an answer denying that the defendant made the note in the complaint mentioned.⁶ And where the defendant alleged as his defense that the note was fraudulently altered in a material point after delivery, without the knowledge or consent of the maker, it was held that the material alteration, though innocently made, was sufficient to avoid the note, and that the allegation of fraud was neither necessary nor material.⁷ But where the defence is, that the note had been fraudulently altered after its execution, the better prac-

tice would be to set up such defense in the answer in order to avoid surprise at the trial.⁸ An admission in the answer of the making, indorsement, and transfer of a promissory note does not preclude the defendant from showing that there was no consideration.⁹ An answer alleging that the note was by mistake given for a greater sum than was due, admits proof under the pleadings that it was given on a settlement of accounts, and by mistake was for a larger amount than the sum actually due.¹⁰ An answer setting up that the plaintiff had accepted the defendant's note for the amount due, whereby the time for the payment of the debt was extended, and that such note was not yet due, but not alleging that the note so accepted was a negotiable note, was held to be frivolous.¹¹ So an answer by a surety on a promissory note, that the principal had delivered it in violation of an agreement made between them, that the latter would procure an additional surety, but not alleging notice of such agreement by the payee, is insufficient.¹² So an answer by one partner that his co-partner, without his consent, executed the note sued on in the firm name, of which the plaintiff at the time had notice, is bad on demurrer; ¹³ otherwise, if it be averred that the defendant, at the time of the execution of the note, did not consent, and objected thereto, of which the plaintiff then had notice.¹⁴ Under Indiana practice, in an action on a promissory note, the answer of a surety, to the effect that he had notified the creditor to sue forthwith on the note, which had not been done, is insufficient on demurrer for the want of facts, if it does not allege that such notice was in writing.¹⁵ So to an action on a joint promissory note, an answer by way of set-off, by one of two or more defendants, must allege that he is principal, and his co-defendants are his sureties, in the plaintiff's cause of action, or it will be

insufficient on demurrer.¹⁶ Where a copy of the note is given with or made part of the petition, an answer merely stating that when the action was brought the note was not in existence cannot be regarded as a denial of the allegations of the petition, nor as containing any defense to the action.¹⁷ So an allegation that A "made, executed, and delivered" a promissory note is not put in issue by an answer denying that he delivered the note.¹⁸ So want of knowledge or information sufficient to form a belief is not a sufficient denial by the defendant of the alleged presentation, demand, refusal of payment, and protest of the bill sued on, when the protest of the notary showing these facts is filed with the petition.¹⁹ An answer alleging that the note sued on was given for interest on other notes, which were drawing interest at the highest rate allowed by law, does not show usury.²⁰ An answer concluding, "and defendant says that he did not execute said note in manner and form as set out in said plaintiff's complaint herein, and that the same is not his note," is sufficient to constitute a good general plea of *non est factum*, although the facts previously stated in the answer are insufficient to constitute a good special *non est factum*, or an answer in confession and avoidance.²¹ Under a statute giving a right of action on a note by an assignee against any assignor, due diligence having been used against the maker, that such diligence has been used must be averred, or a sufficient excuse for the want thereof must be given;²² the insolvency or coverture of the maker, or a request of the assignor not to sue, constitutes a sufficient excuse.²³

1 Swope v. Fair, 18 Ind. 300; Frybarger v. Cockefair, 17 Ind. 404; Evans v. Stone, 80 Ky. 78; Catlin v. Horne, 34 Ark. 168. And see Evans v. Williams, 60 Barb. 346; Favey v. Favey, 30 Ohio St. 600.

2 Swope v. Fair, 18 Ind. 300.

3 Alden v. Carpenter, 7 Colo. 87.

- 4 *New York Trust etc. Co. v. Helmer*, 77 N. Y. 64; 12 Hun, 35.
- 5 *Evans v. Stone*, 80 Ky. 78. A plea that the note sued on was obtained by false representations, without stating what the representations were, was held bad: *Catlin v. Horne*, 34 Ark. 169. And see *Gushee v. Leavitt*, 5 Cal. 160.
- 6 *Boomer v. Koon*, 6 Hun. 645. See *Andrews v. Bond*, 16 Barb. 633; *Beaty v. Swarthout*, 32 Barb. 293.
- 7 *Eckert v. Pickel*, 59 Iowa, 545. And see *Morrison v. Huggins*, 53 Iowa, 78; *Murray v. Graham*, 29 Iowa, 520; *Whitesides v. Northern Bank*, 10 Bush, 501; *Woolfolk v. Bank of America*, 10 Bush, 504.
- 8 *Boomer v. Koon*, 6 Hun, 645. See *Rogers v. Vosburgh*, 87 N. Y. 223.
- 9 *Powers v. French*, 1 Hun, 582.
- 10 *Seeley v. Engell*, 13 N. Y. 542.
- 11 *Webster v. Balnbridge*, 13 Hun, 180.
- 12 *Whitcomb v. Miller*, 90 Ind. 384.
- 13 *Moffitt v. Roche*, 92 Ind. 96.
- 14 *Moffitt v. Roche*, 92 Ind. 96.
- 15 *Mendel v. Cairnes*, 84 Ind. 141.
- 16 *Lynn v. Crim*, 96 Ind. 89. And see *Gregory v. Gregory*, 89 Ind. 345; *Welborn v. Coon*, 57 Ind. 270.
- 17 *Sargent v. Railroad Co.*, 32 Ohio St. 449. See *Castro v. Wetmore*, 16 Cal. 379.
- 18 *Cogswell v. Hayden*, 5 Oreg. 22.
- 19 *Gridler v. Farmers' etc. Bank*, 12 Bush, 333.
- 20 *Moffitt v. Roche*, 92 Ind. 96.
- 21 *Hine v. Shiveley*, 84 Ind. 136.
- 22 *Huston v. Centreville Bank*, 85 Ind. 21. And see *Blanford v. Willson*, 65 Ind. 70; *Roberts v. Masters*, 40 Ind. 461.
- 23 *Huston v. Centreville Bank*, 85 Ind. 21. An answer which denies that the note sued on remains unpaid, and that anything remains due thereon, raises an issue which devolves upon the plaintiff the burden of proving non-payment, by production of the note or otherwise: *Farmers' etc. Bank v. Christensen*, 51 Cal. 571.

§ 125. *Bill of particulars.*—By a provision in the Codes of the different States, the court may direct a bill of the particulars of the claim of either party to be delivered to the adverse party.¹ This provision is declaratory of the practice which formerly existed, and the power conferred should be prudently employed, with the view to enable parties to prepare their pleadings and evidence for the trial of the real issues involved, but not to impose unnecessary labor on any party.² The entire scope and nature of a bill of partic-

ulars is to furnish information to an opponent and to the court of the specific proposition for which the party contends.³ It is appropriate to all descriptions of actions, where the circumstances are such that justice demands, that a party should be apprised of the matters for which he is to be put on trial, with greater particularity than is required by the rules of pleading.⁴ Its office is to amplify a pleading, and indicate specifically the claim set up; but it is neither given nor required for the purpose of disclosing to an adverse party the case relied upon, nor the proof to substantiate it.⁵ The court may exercise the power to order a bill of particulars as well in behalf of the plaintiff as of the defendant.⁶ Thus, either party to an action of ejectment may be required to furnish a bill of particulars of his claim in respect to the land.⁷ But in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial that he should be apprised in advance of the particulars of the charge which he is expected to meet, the court has authority to compel the plaintiff to specify these particulars so far as in his power.⁸ But where the defendant is as well acquainted with the nature and particulars of the claim, and has all the knowledge necessary to enable him to plead, a bill of particulars will not be ordered.⁹ If a party fully knows what his adversary means to rely on for his cause of action or defense, he is not entitled to a bill of particulars.¹⁰

1 See N. Y. Code Civ. Proc. § 531; Cal. Code Civ. Proc. § 454.

2 *Tilton v. Beecher*, 59 N. Y. 176; *Butler v. Mann*, 9 Abb. N. C. 49; *Stiebelung v. Lockhaus*, 21 Hun, 457; *Wigand v. Dejonge*, 18 Hun, 405; *Crane v. Crane*, 82 Ind. 459.

3 *Stevens v. Webb*, 4 Civ. Proc. R. 64; 17 N. Y. Week. Dig. 213; *Walker v. Fuller*, 29 Ark. 448.

4 *Gross v. Clark*, 1 Civ. Proc. R. 464; 87 N. Y. 272; *Dwight v. Germania Life Ins. Co.* 22 Hun, 167; 84 N. Y. 293.

5 *Higenbotham v. Green*, 25 Hun, 214; *Butler v. Mann*, 9 Abb. N. C. 49; *Gee v. Chase Manuf. Co.* 12 Hun, 630; *Drake v. Thayer*, 5 Robt.

694; *Seaman v. Low*, 4 Bosw. 337; *Matthews v. Hubbard*, 47 N. Y. 423; *Melvin v. Wood*, 4 Abb. Pr. N. S. 438; 3 Keyes, 533; *Bowman v. Earle*, 3 Duer, 691.

6 *Dwight v. Germania Life Ins. Co.* 22 Hun, 167; 84 N. Y. 293; *Jones v. Bewicke*, Law R. 5 Com. P. 32; *Wren v. Weild*, Law R. 4 Q. B. 213; *Witowski v. Paramore*, 17 N. Y. Week. Dig. 483; *Clafin v. Smith*, 66 How. Pr. 168.

7 *Stevens v. Webb*, 4 Civ. Proc. R. 64; 17 N. Y. Week. Dig. 213. But it is held that a complaint for money due for the use and occupation of land does not present a claim upon which a bill of particulars can be required: *Moore v. Bates*, 46 Cal. 23.

8 *Tilton v. Beecher*, 59 N. Y. 176. And see *Orvis v. Dana*, 1 Abb. N. C. 263; 6 Daly, 434; *Shaffer v. Holm*, 3 Civ. Proc. R. 81; 16 N. Y. Week. Dig. 127; 28 Hun, 264; *Barkley v. Rensselaer etc. R. R.* 27 Hun, 515; *People v. Nolan*, 10 Abb. N. C. 471; 63 How. Pr. 271.

9 *Blackie v. Neilson*, 6 Bosw. 681; *Powers v. Hughes*, 7 Jones & S. 452; *Young v. De Mott*, 1 Barb. 30; *Powers v. Snedecker*, 5 Month. Law Bull. 22; *United States v. Tilden*, 10 Ben. 547. And see *People v. Tweed*, 50 How. Pr. 38; 5 Hun, 353.

10 *Willis v. Wiley*, 19 Johns. 268; *Wigand v. DeJonge*, 18 Hun, 405; *Stevens v. Webb*, 4 Civ. Proc. R. 64; 17 N. Y. Week. Dig. 213. Nor will a bill of particulars be ordered where the claim is fairly described in the pleadings: *Banks v. Ocean Nat. Bank*, 53 How. Pr. 51.

§ 126. *Bill of particulars—Form, contents, etc.*—A bill of particulars is not required to be in any particular form.¹ It is sufficiently specific if it apprises the adverse party of the evidence to be offered,² or of the grounds of the claim, so that he cannot be surprised.³ It should be more definite and specific than the claim set forth in the pleading,⁴ and if it be too general, the party receiving it should obtain an order for further particulars.⁵ It should set forth with all practicable particularity the date, amount, and general character of each item.⁶ But items described in the pleadings may be omitted,⁷ and when an account has been rendered, it is enough to refer to it generally, without re-stating the items of it.⁸ Nor is a party bound to furnish particulars of set-offs or payments with which he volunteers to credit the opposite party.⁹ Stating the items as "amount advanced" was held to be insufficient.¹⁰ So a bill of particulars requiring a statement of "all matters relating to the conspiracy alleged in the complaint" is too

broad and general in its character, and is unauthorized.¹¹ A bill of particulars alleging payments to various persons should show the name of each, and the amount to each.¹² A variance between the proof and the bill will be disregarded, unless it be calculated to mislead.¹³

1 *Williams v. Allen*, 7 Cowen, 316; *Railroad Co. v. Brown*, 14 Kan. 557.

2 *Smith v. Hicks*, 5 Wend. 43; *Drake v. Thayer*, 5 Robt. 694; *Seaman v. Low*, 4 Bosw. 337.

3 *Brown v. Williams*, 4 Wend. 360; *Stowits v. Bank of Troy*, 21 Wend. 186.

4 *Wetmore v. Jennys*, 1 Barb. 53. And see *St. Louis etc. R. R. Co. v. Provine*, 61 Miss. 288.

5 *Providence Tool Co. v. Prader*, 32 Cal. 634. The items as to which a further account is required should be clearly specified: *Connor v. Hutchinson*, 17 Cal. 280; *Kellogg v. Paine*, 8 How. Pr. 329.

6 *Kellogg v. Paine*, 8 How. Pr. 329; *Humphrey v. Cottlevon*, 4 Cowen, 54; *Quin v. Astor*, 2 Wend. 577. But an omission to state the time at which the work and labor sued for was done is not a fatal defect, or one sufficient to justify the Supreme Court in reversing a judgment: *Mugan v. Haley*, 16 Kan. 63.

7 *People v. Monroe Common Pleas*, 4 Wend. 200.

8 *Goodrich v. James*, 1 Wend. 289.

9 *Ryckman v. Haight*, 15 Johns. 222; *Williams v. Shaw*, 4 Abb. Pr. 209; *Giles v. Betz*, 15 Abb. Pr. 235.

10 *Moran v. Morissey*, 28 How. Pr. 100; 18 Abb. Pr. 131.

11 *Hubbard v. Otis*, 17 N. Y. Week. Dig. 348.

12 *Chandler v. Stevens*, 2 Month. Law Bull. 5.

13 *McNair v. Gilbert*, 3 Wend. 344; *Smith v. Hicks*, 5 Wend. 48. The objection that the bill of particulars accompanying a verified complaint is not itself verified, is waived by retaining the bill without objection, instead of returning it within a reasonable time: *Paine v. Smith*, 32 Wis. 335.

§ 127. **Bonds and undertakings—Complaint.**—A complaint or petition in an action upon a bond, by the obligee therein named, which avers that "the defendant made his obligation, sealed with his seal, and in the words and figures following," setting forth a copy of the instrument, and averring that the defendant has not paid the sum therein mentioned, or any part thereof, and that the whole amount is still due and unpaid, is sufficient, without any averment of a delivery.¹ The delivery of a deed, though essential to its validity, need

not be stated in the pleading.² And since statutory bonds require no consideration though not under seal, no consideration need be averred in pleading.³ So where an undertaking is given in pursuance of a statute, and no demand is required by the terms of the instrument, no such averment is necessary in the complaint in an action upon the undertaking.⁴ But if the condition of the bond is to pay on demand, a demand must be averred.⁵ A bond should be sued on, setting out breaches and damages.⁶ It is, however, a sufficient allegation of a breach as against a demurrer to set forth the condition alleged to have been broken, and aver its non-performance.⁷ In actions on official bonds, a breach of the bond must be clearly assigned or shown.⁸ A complaint in an action on a penal bond, which gives no date whereby it can be ascertained what amount is actually due on the bond, is held to be insufficient.⁹ Generally speaking, in an action to recover upon an undertaking to answer for damages, all the material facts constituting the cause of action must be stated in the complaint.¹⁰ In an action on an undertaking given to procure the release of property held by a sheriff under an attachment, the complaint must aver that the attachment was discharged.¹¹ A breach of a sheriff's bond for failure to levy an execution on chattels, which fails to show that the chattels were within the bailiwick and might have been seized, is not well assigned.¹² So a complaint on the official bond of a sheriff for failure to make levy of an execution within the time required by statute, which does not allege that the sheriff was not otherwise directed by the plaintiff or his agent, is insufficient.¹³ And in a suit upon a sheriff's bond, for failure to levy, and to return an execution within the time required by law, the recovery is limited to nominal damages, unless facts are averred in the

complaint showing actual damages.¹⁴ In a complaint on an official bond against the sureties, it need not be alleged that the officer took the oath of office, if it appears that he entered upon the duties of the office, and when so acting broke any of the conditions of the bond.¹⁵ In an action on an undertaking on appeal, the delivery of the undertaking is sufficiently averred, if the complaint shows that it was filed in the clerk's office.¹⁶ And in such action, an averment in the complaint that execution had been issued on the judgment and returned unsatisfied is unnecessary;¹⁷ the non-payment of the judgment can be shown without issuing an execution.¹⁸

1 *La Fayette Ins. Co. v. Rogers*, 30 Barb. 491. And see *State v. Rush*, 77 Mo. 533; *Roberts v. Good*, 36 N. Y. 408.

2 *Brinkerhoff v. Lawrence*, 2 Sand. Ch. 400; *La Fayette Ins. Co. v. Rogers*, 30 Barb. 491. And see *Marshall v. Rockwood*, 12 How. Pr. 452; *Chappell v. Bissell*, 10 How. Pr. 274.

3 *Johnson v. Ackerson*, 40 How. Pr. 222; 3 Daly, 420; *Harrison v. Utley*, 6 Hun, 565; *Bildersee v. Aden*, 12 Abb. Pr. N. S. 324; 62 Barb. 175; *Doolittle v. Dillany*, 31 N. Y. 350.

4 *Johnson v. Ackerson*, 40 How. Pr. 222.

5 *Douglass v. Rathbone*, 5 Hill, 143; *Davis v. Cary*, 15 Q. B. 418; *State v. Cowles*, 5 Ohio St. 87.

6 *Baker v. Cornwall*, 4 Cal. 15.

7 *Guttridge v. Vanatta*, 27 Ohio St. 366.

8 *Supervisors v. Semler*, 41 Wis. 374; *Calrns v. O'Brieness*, 40 Wis. 467; *Carrington v. Bayley*, 43 Wis. 507; *Western Bank v. Sherwood*, 20 Barb. 383.

9 *Seely v. Hills*, 44 Wis. 434.

10 *Vilhac v. Railroad Co.* 53 Cal. 209.

11 *Jenner v. Stroh*, 52 Cal. 504.

12 *State v. White*, 88 Ind. 587.

13 *Motgomery v. State*, 53 Ind. 138. *State v. Emmons*, 88 Ind. 279.

14 *State v. Dixon*, 80 Ind. 150. See *Winsor v. Orcutt*, 11 Paige, 573.

15 *Mowbray v. State*, 88 Ind. 324. And see *Supervisors v. Pindar*, 3 Lans. 8.

16 *Holmes v. Ohm*, 23 Cal. 268.

17 *Tissot v. Darling*, 9 Cal. 278.

18 *Tissot v. Darling*, 9 Cal. 278.

§ 128. Bonds and undertakings — Answer. — It is a general rule in pleading that matter in discharge or avoid-

ance of a bond must be specially pleaded.¹ Such matter should be alleged positively and in direct terms, and should not be left to inference.² If it is sought to avoid a bond for being illegally taken, *colore officii*, the answer should specially set forth all the facts which show that illegality.³ If it be merely alleged that seals were affixed to a bond without the consent of the defendant, without alleging that it was done with the knowledge, or by the authority or direction of the plaintiff, it is insufficient.⁴ A general plea of performance, in answer to a complaint assigning a particular breach, is bad on demurrer.⁵ In a suit on an official bond, an answer as to all the breaches alleged in the complaint, that the acts and doings of the officer, as such, were had and done with the full knowledge of the plaintiffs, and by their advice and consent, and by the advice and consent of their attorneys, was held to be too indefinite.⁶ So, in a suit upon such bond, an answer by sureties that the sureties on a former bond had, upon proper application, in term obtained an order from a judge *pro tempore* discharging them, which, however, was never entered of record, and thereupon the bond sued on was executed, is bad.⁷ In an action on a bond each breach assigned, with the introductory averments, is regarded as a separate paragraph of complaint, with a view to making issue, and an answer in bar of the whole action, insufficient as to one of the breaches assigned, is bad on demurrer.⁸ In a suit on a constable's bond, for a breach of the condition thereof in negligently suffering the escape of a defendant in a bastardy prosecution, a plea that the defendant in bastardy was not guilty is bad.⁹ A breach of the condition of a penal bond is not sufficiently traversed by a plea averring that the obligors have not violated the condition to the extent charged, but it should deny any

breach of the condition as charged.¹⁰ In an action upon a bond alleged to have been lost, the defendant may show in evidence under a general denial that he never executed the alleged bond, such evidence being material as tending to dispute its existence.¹¹ Where the complaint alleged that, by the terms of the bond sued on, damages for the breach of the contract referred to in it were duly liquidated at five thousand dollars, an answer denying each and every allegation in the complaint not admitted, and admitting the execution of a bond, with the condition mentioned in the complaint, was held to put in issue the allegation of the complaint, that by the terms of the bond the damages were liquidated at five thousand dollars.¹² A township bond recited that the township officers executing it had been authorized, as the law required, to issue such bond, and it was held in a suit on the bond that the township could set up that no such authority had been given.¹³ The surrender of a bond to an obligor, and the collection thereof, is, in legal effect, the same as a release of a cause of action on the bond, and may be pleaded in bar of an action to recover the amount of the bond.¹⁴ At common law, an obligor in a bond cannot defend an action thereon, upon the ground of a want of consideration, or that the consideration had failed.¹⁵ The seal at common law is conclusive evidence of a sufficient consideration.¹⁶ But this rule has been changed by statute in some of the States, and the presumption of a consideration may be rebutted in the answer.¹⁷ The obligor has the right to avoid the instrument if he can, by showing that there was no sufficient consideration for the contract, but the burden is upon him to establish this.¹⁸ And under the Texas statute, although a sealed instrument shows upon its face that there was no consideration to make it binding

in law, that defense must be asserted by a plea supported by affidavit, and is not available by means of a demurrer or exception.¹⁹ In a suit by a sheriff upon an indemnity bond, given to indemnify him against a levy and sale on execution of property claimed by a third person, the sureties may prove in mitigation of damages, under a general denial, the amount received by the sheriff upon the sale.²⁰ So in an action on a bond given for the faithful performance of duties, a surety may show in evidence under the general denial a settlement between the plaintiff and the principal in the bond, of all demands against the latter.²¹ An answer, in effect a plea of *nil debet*, to an action on a writing obligatory, was a bad plea at common law, and is inadmissible under Code practice.²²

1 Greathouse v. Dunlap, 3 McLean, 303; Bottomley v. United States, 1 Story, 135.

2 United States v. Bradley, 10 Peters, 343.

3 United States v. Sawyer, 1 Gall. 80.

4 United States v. Linn, 1 How. 104.

5 Thomas v. Van Ness, 4 Wend. 549; Beach v. Barrows, 13 Barb. 305; Gott v. State, 44 Md. 319.

6 State v. Dougherty, 32 Ind. 350.

7 Harvey v. State, 94 Ind. 159.

8 State v. Roche, 94 Ind. 372. And see Colburn v. State, 47 Ind. 310; Mustard v. Hoppess, 69 Ind. 324; Reno v. Tyson, 24 Ind. 56; Frazee v. Frazee, 70 Ind. 411.

9 Lakin v. State, 89 Ind. 68.

10 United States v. Dair, 4 Bliss. 280.

11 Millikan v. State, 70 Ind. 310.

12 Walsh v. Mehrback, 5 Hun, 448.

13 Hudson v. Inhabitants etc. 35 N. J. L. 437.

14 Paxton v. Wood, 77 N. C. 11.

15 Van Valkenburgh v. Smith, 60 Me. 97.

16 Vroman v. Phelps, 2 Johns. 177; Dorr v. Munsell, 13 Johns. 430; Page v. Tryfaut, 2 Mass. 150.

17 See McCarty v. Beach, 10 Cal. 461; Wills v. Kempt, 17 Cal. 98.

18 Home Ins. Co. v. Watson, 59 N. Y. 390.

19 Pierce v. Wright, 33 Tex. 631. And see Short v. Price, 17 Tex. 403; Lewin v. Houston, 8 Tex. 97.

20 O'Brien v. McCann, 58 N. Y. 373.

21 Wheeler etc. Manuf. Co. v. Tinsley, 75 Mo. 453.

22 Moore v. Nichols, 39 Ark. 145. And see Sevier v. Willson, 8 Ark. 496.

‡ 129. **Breach of promise to marry—Complaint.**—An action on a promise to marry can be maintained only when the contract is mutual,¹ and the complaint must allege that the promise was mutual.² So the readiness and willingness of the plaintiff to fulfill the marriage promise is material, and must be averred.³ But if the promise was to marry on a certain day named, the complaint need not aver a request for performance.⁴ So where the complaint avers the marriage of the defendant to another, it is not necessary to aver that the plaintiff had requested the defendant to fulfill the promise;⁵ the averment of marriage dispenses with request.⁶ And in averring the marriage of the defendant with another, it is not necessary to aver that such other is still living.⁷ So, when the complaint states sufficiently the promise to marry by the defendant, and his representation that he was unmarried, and competent to marry the plaintiff, it is unnecessary to allege that he knew this representation to be false.⁸ It is not necessary to allege the age of the plaintiff in a suit for breach of promise to marry.⁹ But unless special damages are averred in such suit, evidence of damage should be confined to that which is the direct, natural, and necessary consequence of the breach.¹⁰ The loss of the plaintiff's health must be averred in order to recover damages therefor.¹¹ So the fact that the plaintiff has been seduced by the defendant, by means of the alleged promise of marriage, may be shown to enhance the damages, if it is alleged in the complaint, but not otherwise.¹² And among the elements of actual damages which it is held should be alleged and proven have been included

the disappointment of reasonable expectations, the money value or worldly advantages of the proposed marriage, the injury to the feelings and affections, the wounding of the pride, and the actual outlay in the preparation for the marriage, etc.¹³ The action cannot be maintained against an infant,¹⁴ and this is so, although the plaintiff may, by reason of the promise to marry, have been induced to allow him to have connection with her.¹⁵ But where the promise is alleged to have been made at a certain date, to which the defendant pleaded infancy, it is not error for the court to permit an amended petition to be filed, stating other promises, and a ratification of the first promise after the defendant came of age.¹⁶ If the names of the parties are given in full in the caption and commencement of the complaint, the fact that in one paragraph the plaintiff is identified as "she" and "her," without reference to the caption, is a sufficient identification.¹⁷ It is held that a promise to marry may be inferred from circumstances,¹⁸ and a promise of marriage freely made is not nullified by another made under duress.¹⁹

1 Wells v. Padgett, 8 Barb. 323.

2 King v. Kersey, 2 Ind. 402; Cates v. McKinney, 48 Ind. 562; Buzzard v. Knapp, 12 How. Pr. 504; Roper v. Clay, 18 Mo. 383.

3 Graham v. Martin, 64 Ind. 507.

4 Graham v. Martin, 64 Ind. 567; Haymond v. Saucer, 84 Ind. 3, 6. Compare Clements v. Moore, 11 Ala. 35; Coll v. Wallace, 24 N. J. L. 291; Hook v. George, 108 Mass. 324; Fible v. Caplinger, 13 Mon. B. 464. And after the defendant has renounced his promise to marry the plaintiff, she is not obliged to request him to fulfill it before bringing suit, although the time fixed for performance has not passed; Burtis v. Thompson, 42 N. Y. 246; Kurtz v. Frank, 76 Ind. 504; 40 Am. Rep. 275; Frost v. Knight, Law R. 7 Ex. 111.

5 Short v. Stone, 18 Q. B. 358; Calnes v. Smith, 15 Mees. & W. 189. And see Stevenson v. Pettis, 12 Phila. 463; Lovelock v. Franklyn, 8 Q. B. 371.

6 Short v. Stone, 8 Q. B. 358.

7 Short v. Stone, 8 Q. B. 358.

8 Blattmacher v. Saal, 7 Abb. Pr. 403; 29 Barb. 22. And see Leopold v. Poppenheimer, 1 Code R. 39.

9 Glasscock v. Shell, 57 Tex. 215.

- 10 *Bedell v. Powell*, 13 Barb. 183.
- 11 *Bedell v. Powell*, 13 Barb. 183. And see *Giese v. Schultz*, 53 Wis. 463.
- 12 *Cates v. McKinney*, 48 Ind. 562; 17 Am. Rep. 768; *Kurtz v. Frank*, 76 Ind. 594; 40 Am. Rep. 275; *Leavitt v. Cutler*, 37 Wis. 46; *Giese v. Schultz*, 53 Wis. 463; *Sauer v. Schulenberg*, 33 Md. 288; 3 Am. Rep. 174. See *Matthews v. Cribbett*, 11 Ohio St. 330; *Roper v. Clay*, 18 Mo. 383. One action may be maintained for a breach of promise to marry and for seduction under the promise: *Haymond v. Saucer*, 84 Ind. 3.
- 13 See *Glasscock v. Shell*, 57 Tex. 215; *Harrison v. Swift*, 13 Allen, 145; *Sherman v. Rawson*, 102 Mass. 399; *Kelley v. Riley*, 106 Mass. 339; 8 Am. Rep. 336.
- 14 *Hamilton v. Lomax*, 26 Barb. 615; 6 Abb. Pr. 142.
- 15 *Leichtweiss v. Treskow*, 21 Hun. 487.
- 16 *Schreckengast v. Ealey*, Sup. Ct. Neb. 20 N. W. Rep. 853; 16 Neb. 510.
- 17 *Cates v. McKinney*, 48 Ind. 562; 17 Am. Rep. 768.
- 18 *Hotchkiss v. Hodge*, 38 Barb. 11; *Coll v. Wallace*, 27 N. J. L. 291; *McCrum v. Hildebrand*, 85 Ind. 204. And see *Wagenseller v. Simmers*, 97 Pa. St. 465. But evidence of illicit sexual intercourse between the parties is inadmissible to prove a promise to marry: *Felger v. Etzell*, 75 Ind. 417.
- 19 *McCrum v. Hildebrand*, 85 Ind. 204. The husband of a plaintiff, in an action for breach of promise to marry, married since the action was commenced, is not a necessary party to the action: *Shuler v. Millsap*, 71 N. C. 297.

§ 130. **Breach of promise to marry — Answer.** — Infancy, when pleaded, is a valid defense to an action for the breach of a promise to marry.¹ So a promise of marriage in consideration that the promisee should before marriage have sexual connection with the promisor is void, and an action thereon cannot be sustained.² And so of a promise by a man to marry when a divorce should be decreed between himself and his wife in a suit then pending.³ The defendant may introduce evidence, in mitigation of damages, of the fact that he was afflicted with an incurable disease at the time of the breach of the promise to marry.⁴ But where the defendant failed to perform his promise upon the ground that he was afflicted with a venereal disease which unfitted him for the married state, it was held that he would be answerable in damages if the disease was contracted subsequently to the time of making the

promise, or if before, and he knew his infirmity was incurable; ⁵ but if it was contracted prior to the promise, and he had reason to believe it was temporary only, he would be excusable. ⁶ It is no defense to the action that the plaintiff had previously contracted to marry another person; ⁷ nor that the defendant felt that the proposed marriage would not tend to the happiness of both parties. ⁸ Under a general denial, evidence that the plaintiff drank to excess, and sometimes got intoxicated, although not competent as a defense to the action, is admissible in mitigation of damages, as is any evidence that the plaintiff would be an unfit companion in married life. ⁹ The defendant was permitted to show, in mitigation of damages, an act of adultery by the plaintiff more than twenty-five years previously, although no such defense had been pleaded. ¹⁰ But it was held that proof that the defendant's promise of marriage was obtained by the plaintiff fraudulently should not be admitted unless the fact is alleged in the answer. ¹¹ In New York, in an action for the breach of a promise to marry, the defendant may prove at the trial facts not amounting to a total defense, tending to mitigate the plaintiff's damages, if they are set forth in the answer, either with or without one or more defenses to the entire cause of action. ¹² The interposition of a defense to such action, that the character of the plaintiff is unchaste, even if unsuccessful, ought not, *per se*, to aggravate the damages, unless it is interposed in bad faith, from malice, wantonness, or recklessness. ¹³ But if the defendant wantonly, with intent to injure the plaintiff and without reasonable belief that he will be able to prove it, alleges in his answer that the plaintiff is unchaste, and has had illicit intercourse with other men, it may be considered in aggravation of damages. ¹⁴ And when in an action for breach

of promise to marry and for seduction, the defendant has adduced evidence of particular acts of indiscretion by the plaintiff, she may rebut by showing her good character for chastity.¹⁵ It is held to be no defense to an action for a breach of promise to marry that the defendant was married at the time of the promise, if the plaintiff was ignorant of that fact.¹⁶

- 1 Rush v. Wick, 31 Ohio St. 521; Leichtweiss v. Treskow, 21 Hun, 487.
- 2 Honks v. Naglee, 54 Cal. 51; 35 Am. Rep. 57; Boiguieres v. Boulon, 54 Cal. 146; Steinfeld v. Levy, 16 Abb. Pr. N. S. 26.
- 3 Noice v. Brown, 38 N. J. L. 228.
- 4 Sprague v. Craig, 51 Ill. 288. Compare Boast v. Firth, Law.R. 4 Com. P. 8.
- 5 Allen v. Baker, 86 N. C. 91; 41 Am. Rep. 441.
- 6 Allen v. Baker, 86 N. C. 91; 41 Am. Rep. 441.
- 7 Roper v. Clay, 18 Mo. 383.
- 8 Coolidge v. Neat, 129 Mass. 146.
- 9 Button v. McCauley, 5 Abb. Pr. N. S. 29; 1 Abb. Ct. App. 282; reversing, 38 Barb. 413.
- 10 Tompkins v. Wadley, 3 Thomp. & C. 424.
- 11 Leavitt v. Cutler, 37 Wis. 46. Compare Bell v. Eaton, 28 Ind. 463; Hunter v. Hatfield, 68 Ind. 416.
- 12 N. Y. Code Civ. Proc. § 533.
- 13 Powers v. Wheatley, 45 Cal. 113; White v. Thomas, 12 Ohio St. 312.
- 14 Haymond v. Saucer, 84 Ind. 3; Denslow v. Van Horn, 16 Iowa, 476. And see Thorn v. Knapp, 42 N. Y. 474; Reed v. Clark, 47 Cal. 194; Simpson v. Black, 27 Wis. 206; Leavitt v. Cutler, 37 Wis. 46.
- 15 Haymond v. Saucer, 84 Ind. 3; American Express Co. v. Patterson, 73 Ind. 430.
- 16 Kelley v. Riley, 106 Mass. 339; Stevenson v. Pettis, 12 Phila. 468; Cooper v. Davenport, 1 Helsk. 368; Wild v. Harris, 7 Com. B. 999. And see Prescott v. Guyler, 32 Ill. 312.

§ 131. **Civil Damage Act.**—In many of the States, a cause of action for damages in favor of a person injured in person or property by the act of an intoxicated person, against the person or persons causing the intoxication, has been created by statute commonly known as the "Civil Damage Act."¹ The injury to the means of support is one of the main grounds of the action, and when the party is deprived of the usual

means of maintenance; which he or she was accustomed to enjoy previously, by or in consequence of the intoxication or the acts of the person intoxicated, the action can be maintained; ² and both direct and consequential injuries are included in the remedy given.³ Where injury to "means of support" is the *gravamen* of the action, the plaintiff must show that in consequence of the intoxication or the acts of the intoxicated person, the plaintiff's accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependance by being deprived of the support he had before enjoyed.⁴ Generally speaking, it is sufficient that the statutory grounds of action are all sufficiently set forth in the complaint or petition.⁵ The complaint need not aver the kind of intoxicating liquor sold, nor that the defendant had no license, nor that such liquor was sold on his premises; nor that the person was intoxicated, or in the habit of becoming so, at the time of such sale.⁶ But a complaint alleging that the defendant "sold, bartered, or gave, or permitted to be sold, bartered, or given to" such person, in the defendant's "saloon, a quantity of intoxicating liquor, which" such person "then and there, in and upon said premises, drank," and thereby became, "in whole or in part, intoxicated," was held to be insufficient in that it did not show that the defendant had "caused" such intoxication.⁷ So an allegation that "while in a state of intoxication so that he was incapable of knowing what he was about, or taking care of himself, he fell into an open cellar," etc., is held not to be equivalent to an averment that, "in consequence of the intoxication," he fell, etc., as the statute requires.⁸ Under the Nebraska statute, it is only necessary to allege and prove the fact of selling or furnishing intoxicating liquors by the defendants to the

deceased, on or about the day of his intoxication.⁹ A declaration under the Michigan statute will allow evidence of damages from further degrading a man who was not temperate at the outset.¹⁰ And a wife's right of recovery under the statute is not affected by the fact that she had signed the defendant's petition for a dram-shop license.¹¹ A license to sell liquor does not bar an action under the statute.¹² Nor is it any defense to the action that the plaintiff lent his horse on Sunday to the one who went with it to the defendant's and got intoxicated.¹³

1 See *Bertholf v. O'Reilly*, 8 Hun, 16; 74 N. Y. 509; 30 Am. Rep. 323; *Franklin v. Schermerhorn*, 8 Hun, 112; *State v. Ludington*, 33 Wis. 107; *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386; *Schroeder v. Crawford*, 94 Ill. 357; *Welch v. Jugenheimer*, 56 Iowa, 11; *Kirchner v. Myers*, 35 Ohio St. 85; *Good v. Towns*, 56 Vt. 410; 48 Am. Rep. 799.

2 *Volans v. Owen*, 74 N. Y. 526; 30 Am. Rep. 337; *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386; *Davis v. Standish*, 26 Hun, 608; *Schneider v. Hosler*, 21 Ohio St. 98; *Quain v. Russell*, 8 Hun, 319; *Peterson v. Knoble*, 35 Wis. 80; *Neu v. McKechnie*, 95 N. Y. 632; 47 Am. Rep. 89.

3 *Volans v. Owen*, 74 N. Y. 526; 30 Am. Rep. 337. And see *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625.

4 *Volans v. Owen*, 74 N. Y. 526; 30 Am. Rep. 337.

5 See *Schneider v. Hosler*, 21 Ohio St. 98; *Peterson v. Knoble*, 35 Wis. 80; *Quain v. Russell*, 8 Hun, 319.

6 *Walser v. Kerrigan*, 56 Ind. 301. The allegation of the particular place of sale does not prevent proof of sales at other places: *Gustafson v. Wind*, 62 Iowa, 281.

7 *Ditton v. Morgan*, 56 Ind. 60.

8 *Schwarm v. Osborn*, 59 Ind. 245.

9 *Kerkow v. Bauer*, 15 Neb. 150.

10 *Friend v. Dunks*, 39 Mich. 733. Compare *Gustafson v. Wind*, 62 Iowa, 281.

11 *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625.

12 *Dubois v. Miller*, 5 Hun, 332; *Quain v. Russell*, 12 Hun, 376.

13 *Bertholf v. O'Reilly*, 8 Hun, 16; *Platz v. City of Cohoes*, 24 Hun, 101.

§ 132. **Claim and delivery—Replevin.**—Proceedings in an action for "claim and delivery" under the Code system of practice are in many respects analogous to those in "replevin" at common law.¹ The provisions

of the statute relative to the forms of pleading in the action should be pursued, but a substantial compliance therewith is held to be sufficient.² The gist of the action is the wrongful detention of the property;³ and without an averment of a wrongful detention, the complaint or petition does not state a cause of action.⁴ But a mere allegation of wrongful detention is not enough.⁵ And in order to maintain the action, the plaintiff must allege in his complaint or petition, interest in himself, right of immediate possession, and detention on the part of the defendant.⁶ But if he sets forth that he is the owner of the property in controversy, describing it, or that he has a special ownership or interest therein, stating the facts in relation thereto, that he is entitled to the immediate possession of the property, and that the defendant wrongfully detains it from him, it is enough;⁷ and a general denial on the part of the defendant is sufficient to put in issue all these allegations, and to throw the burden of proving them upon the plaintiff;⁸ and if the plaintiff fails to prove his averments, such general denial determines that the property should be restored to the defendant, if it has been delivered to the plaintiff under proceedings in the action.⁹ A complaint which does not aver any right or title in the plaintiff is bad.¹⁰ But the right may be stated in general terms;¹¹ and if the plaintiff avers the title and right of possession to be in him, and a wrongful detention, and also avers the particular facts upon which his title and right of possession are claimed, a denial of the first averments is sufficient, without a denial of the latter.¹² In a complaint for claim and delivery and damages for the detention of the property, an allegation of the conversion of the property by the defendant may be regarded as surplusage.¹³ An averment in the complaint that "the plaintiff was the owner and in pos-

session of the property," is not traversed by an answer which denies that the "plaintiff was the owner, and entitled to the possession of the property." ¹⁴ If the defendant came lawfully into possession of the property, demand and refusal must be averred. ¹⁵ If special damages are claimed, they should be specially alleged ; ¹⁶ but this rule does not apply where the statute clearly provides for "damages for the détention." ¹⁷ The defendant is not entitled to damages unless he sets them up in his answer. ¹⁸ An averment of value of the goods and damages for their detention being material allegations, a failure to deny them is to admit them to be true. ¹⁹ Under an answer by the defendant alleging that he is the owner of the property, and that he does not unlawfully detain it, he may prove that a mortgage under which the plaintiff claims title and possession was a forgery. ²⁰ So, under a general denial in the answer, it is not error in the court to allow the defendant to prove his right to the possession by virtue of a lien to defeat a recovery by the plaintiff. ²¹ And an answer setting forth that the title of the plaintiff is as administrator of a mortgagee, and that such mortgage was made with intent to defraud creditors, and setting forth facts constituting fraud, and alleging that the defendant had purchased the goods at a sale on an execution had by a constable, is good on demurrer. ²² To support an action of claim and delivery, the property must be a personal chattel at the time of the taking ; ²³ and the property should be particularly described. ²⁴ If the property claimed be so mixed with other property that a delivery of the specific article cannot be made, and the plaintiff fails to ask judgment for its value in case it cannot be delivered, the action of claim and delivery cannot be sustained. ²⁵

1 See *Pico v. Pico*, 56 Cal. 453; *Pope v. Jackson*, 65 Me. 167; *Oleson v. Merrill*, 20 Wis. 462; *Wilson v. Fuller*, 9 Kan. 181; *Latimer v. Motter*, 26 Ohio St. 480; *Stockwell v. Phelps*, 34 N. Y. 363; *Paul v. Luttrell*, 1 Colo. 317; *Richey v. Du Pre*, 20 S. C. 6; *Council v. Averett*, 90 N. C. 183.

2 *Busick v. Bumm*, 3 Iowa, 63; *Smith v. Montgomery*, 5 Iowa, 371; *Auld v. Kimberlin*, 7 Kan. 601; *Pirani v. Barden*, 5 Ark. 81.

3 *Brown v. Holmes*, 13 Kan. 491; *Moore v. Kepner*, 7 Neb. 291; *Krug v. Herod*, 69 Ind. 78; *Williams v. West*, 2 Ohio St. 82.

4 *Draper v. Ellis*, 12 Iowa, 316; *Hurd v. Simonton*, 10 Minn. 423; *Childs v. Hart*, 7 Barb. 370; *Leroy v. McConnell*, 8 Kan. 273.

5 *Scofield v. Whitelegge*, 10 Abb. Pr. N. S. 104; *aff'd*, 12 Abb. Pr. N. S. 320; 49 N. Y. 259; *Tronson v. Union Lumbering Co.* 38 Wis. 202.

6 *Wilson v. Fuller*, 9 Kan. 177; *Yandle v. Crane*, 13 Kan. 347.

7 *Holsington v. Armstrong*, 22 Kan. 110. And see N. Y. Code Civ. Proc. § 1720. Compare *Chapin v. Merchants' Nat. Bank*, 31 Hun, 523; *Davenport Glucose Manuf. Co. v. Taussig*, 31 Hun, 563; *Baker v. Cordwell*, 6 Colo. 199. That ownership is implied from an allegation of sale and delivery: See *Morrison v. Lewis*, 17 Jones & S. 173.

8 *Wilson v. Fuller*, 9 Kan. 177; *Bailey v. Boyne*, 20 Kan. 657; *Moore v. Kepner*, 7 Neb. 291; *McKillop v. Burhans*, 12 N. Y. Week. Dig. 185. And see *Ford v. Ford*, 3 Wis. 398; *Jansen v. Effe*, 10 Iowa, 231; *Walpole v. Smith*, 4 Blackf. 304; *Bond v. Mitchell*, 3 Barb. 304; *Williams v. Mathews*, 30 Minn. 131; *Carman v. Ross*, 64 Cal. 249.

9 *Pico v. Pico*, 56 Cal. 453.

10 *Scofield v. Whitelegge*, 10 Abb. Pr. N. S. 104; *aff'd*, 12 Abb. Pr. N. S. 320; 49 N. Y. 259. A complaint which avers that the plaintiff "was and is in the possession of the property" does not state a cause of action: *Carman v. Ross*, 64 Cal. 249.

11 *Barclay v. Quicksilver Min. Co.* 6 Lans. 25; *Helme v. Anderson*, 2 Duer, 318. Compare *Dambmann v. White*, 43 Cal. 439; *Simmons v. Lyons*, 55 N. Y. 671; *Stickney v. Smith*, 5 Minn. 486; *Malcolm v. O'Reilly*, 14 Jones & S. 222; 89 N. Y. 156; *Vaudenburgh v. Van Valkenburgh*, 8 Barb. 217; *Robinson v. Fitch*, 26 Ohio St. 653; *Morrison v. Lewis*, 17 Jones & S. 173.

12 *Nudd v. Thompson*, 34 Cal. 30.

13 *Banfield v. Haeger*, 13 Jones & S. 423; 7 Abb. N. C. 318.

14 *Richardson v. Smith*, 29 Cal. 523. Compare *Carman v. Ross*, 64 Cal. 249.

15 *Scofield v. Whitelegge*, 10 Abb. Pr. N. S. 104; *aff'd*, 12 Abb. Pr. N. S. 320; 49 N. Y. 259; *Rawley v. Brown*, 13 Hun, 456; *Campbell v. Jones*, 38 Cal. 507; *Shoemaker v. Simpson*, 16 Kan. 43; *Hurd v. Simonton*, 10 Minn. 423; *Treat v. Hathorn*, 3 Hun, 646; *Ryerson v. Kauffeld*, 13 Hun, 399. Compare *Brown v. Holmes*, 13 Kan. 492; *Oleson v. Merrill*, 20 Wis. 462; *Simser v. Cowan*, 56 Barb. 395; *Stone v. Bird*, 16 Kan. 483; *Knapp v. Schneider*, 10 Daly, 213.

16 *Stevenson v. Smith*, 23 Cal. 102. And see *Park v. McDaniels*, 37 Vt. 595.

17 *Zitske v. Goldberg*, 33 Wis. 216.

18 *Whitcomb v. Hoffman*, 14 Hun, 335.

19 *Tucker v. Parks*, 7 Colo. 62; *Snell v. Crowe*, 3 Utah, 26; *Tully v. Harloe*, 35 Cal. 306. But see *Bailey v. Ellis*, 21 Ark. 439; *Railroad Co. v. Packet Co.* 33 Iowa, 377.

20 *Gandy v. Pool*, 14 Neb. 83.

21 *Lindsay v. Wyatt*, 1 Idaho, 738.

22 *McFadden v. Fritz*, 90 Ind. 580.

23 *Hull v. Hull*, 1 Idaho, 361.

24 *Smith v. Stanford*, 62 Ind. 392; *Jones v. Minogue*, 29 Ark. 637. And see *James v. Fowler*, 90 Ind. 563; *Paup v. Sylvester*, 22 Iowa, 371.

25 *Hull v. Hull*, 1 Idaho, 361.

§ 133. *Common carrier*.—A complaint which alleges the delivery of goods by the owner to another, and an acceptance by such other, to be carried from one place to another without reward, the loss of such goods by the bailee, and that the loss was occasioned by the gross negligence of the bailee, stating the value of the goods and the damage to the bailor, states a good cause of action.¹ In tort against a common carrier, it is not necessary to allege that a compensation was paid or agreed to be paid for carrying the goods.² But the complaint should allege that the defendant was a common carrier, in order that he may be held responsible in that character.³ A complaint alleging that the defendants were common carriers of passengers by omnibus or stage, and that they undertook to carry the plaintiff for hire, was held to be sufficient, without alleging that they received compensation from other passengers.⁴ So an averment that the defendant, a common carrier, accepted the plaintiff as a passenger, conveys an implied agreement that the plaintiff will pay the fare and that the carrier will carry safely, and no averment to that effect is necessary.⁵ In an action against a common carrier of passengers, to recover damages for a refusal to carry the plaintiff, it is not necessary to allege a tender of the fare;⁶ it is sufficient to allege that the plaintiff was ready and willing to pay the defendant such sum of money as it was legally entitled to charge.⁷ It is a legal presumption that upon the delivery of goods by the consignor to a common carrier, the title thereto vests in the consignee;⁸ and in an action by

the consignor against the common carrier, for damages for the non-delivery of the goods to the consignee at the place stipulated in the contract, the complaint will be bad on demurrer if it does not allege that the plaintiff was the owner of such goods, or that such goods were not elsewhere delivered to and accepted by the consignee than the place named in the contract.⁹ So a complaint which does not state the date of the draft which was lost by a common carrier, the amount for which it was drawn, the time when it was payable, or to whom payable, is insufficient.¹⁰ So a complaint in an action by a passenger against a railroad company, for carrying him past a station, must aver that the train should have stopped at such station, or that by a special contract the company had agreed to carry him to that station, and let him off there.¹¹ If a carrier claims exemption from his common-law liability, under a bill of lading not signed by the owner or consignor of the goods, he must aver and prove that such bill was assented to by the shipper.¹² An averment that the goods, for the non-delivery of which the defendant is sued, were lost by unforeseen, inevitable accident, without averring why the accident was unforeseen and inevitable, is not good.¹³ If goods are destroyed by reason of a failure on the part of the carrier to perform his contract of transportation, the shipper is excused freight, and the failure to perform is a defense going to the whole cause of action for freight, and may be proved under a general denial.¹⁴ Where the complaint in an action against a common carrier to recover damages for the non-delivery of goods merely alleges a breach of his common-law duty, and the evidence shows that the goods were received for carriage under a special written contract which was not declared upon, the variance is fatal, and the plaintiff cannot recover.¹⁵ So if the com-

plaint seeks to make the defendant liable as a warehouseman for the loss of goods, there cannot be a recovery against him in some other capacity, as in that of a common carrier.¹⁶

1 McCauley v. Davidson, 10 Minn. 418. It is essential to aver a delivery of the goods to the carrier: *Jordon v. Hazard*, 10 Ala. 221. And that he accepted or undertook to carry the goods: *Sommerville v. Merrill*, 1 Port. 107.

2 *Hall v. Cheney*, 38 N. H. 28. And see *Ferguson v. Cappeau*, 6 Har. & J. 394; *Wiggin v. Railroad Co.*, 120 Mass. 201. Compare *Bristol v. Railroad Co.*, 9 Barb. 153.

3 *Bristol v. Railroad Co.*, 9 Barb. 158.

4 *Roberts v. Johnson*, 5 Jones & S. 157; 53 N. Y. 613.

5 *Lemon v. Chanslor*, 68 Mo. 340. And see *Nolton v. Railroad Co.*, 10 How. Pr. 97; 15 N. Y. 444.

6 *Tarbell v. Railroad Co.*, 34 Cal. 616.

7 *Tarbell v. Railroad Co.*, 34 Cal. 616.

8 *Railroad Co. v. Whitesel*, 11 Ind. 55; *Pennsylvania Co. v. Holderman*, 63 Ind. 18.

9 *Pennsylvania Co. v. Holderman*, 69 Ind. 18.

10 *Zeigler v. Wells*, 23 Cal. 179.

11 *Railroad Co. v. Hatton*, 60 Ind. 12. See *People v. Haberstro*, 16 Alb. L. J. 151.

12 *Gaines v. Union Transportation Co.*, 23 Ohio St. 418.

13 *Bentley v. Bustard*, 16 Mon. B. 643.

14 *Dunham v. Bower*, 77 N. Y. 76.

15 *Hall v. Pennsylvania Co.*, 90 Ind. 459. And see *Railroad Co. v. Remmy*, 13 Ind. 518; *Railroad Co. v. Bennett*, 89 Ind. 457; *Railroad Co. v. Worland*, 50 Ind. 339; *Gaines v. Union Transportation Co.*, 23 Ohio St. 418. In cases where there is a special contract with the carrier, by which his common-law liability is restricted, and the action against him is in tort for the breach of a duty or obligation imposed by law, the complaint or petition need not notice the special contract, although it may be under seal: *Clark v. Railroad Co.*, 64 Mo. 440. See *Oxley v. Railroad Co.*, 65 Mo. 629.

16 *Porter v. Railroad Co.*, 20 Iowa, 73. See *Golden v. Romer*, 20 Hun, 438. It is held, under the Wyoming Code, that a carrier sued for the loss of baggage may, in connection with a general denial, plead that he had tendered the baggage in good condition to the defendant and kept the tender good: *Lake Shore etc. R. R. Co. v. Warren*, 6 West C. Rep. 416; 6 Pacif. L. Rep. 724.

§ 134. **Conspiracy.**—A simple conspiracy, unless it results in actual damage, is not the subject of a civil action, and is necessary to be averred and proved only where a verdict is demanded against two or more defendants.¹ The allegation of conspiracy is of no im-

portance so far as it respects the cause and ground of action.² The conspiracy should be distinctly averred;³ and in an action for conspiracy, the rule is to allow great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred, even so far as to allow the individual acts of the conspirators to be averred.⁴ A complaint which alleged that defendants "in concert did, by connivance, conspiracy, and combination, cheat and defraud the plaintiffs out of certain goods of" a value specified, was held not to state facts sufficient to constitute a cause of action.⁵ A party is entitled to have the complaint or petition made definite and specific by a statement of the facts showing the terms, nature, and extent of the conspiracy, and is not compelled to go to trial upon the mere general allegation that there was a combination and conspiracy.⁶

1 *Hutchins v. Hutchins*, 7 Hill, 107; *Herron v. Hughes*, 25 Cal. 500. A conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give a right of action: *Jayne v. Drorbaugh*, 63 Iowa, 711.

2 *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun, 586; 18 N. Y. Week. Dig. 116; *Forsyth v. Edmiston*, 11 How. Pr. 408. And see *Bowen v. Matheson*, 14 Allen, 499; *Parker v. Huntington*, 2 Gray, 124; *Laverty v. Vanarsdale*, 65 Pa. St. 507.

3 *McHenry v. Hazard*, 45 Barb. 657.

4 *Mussina v. Clark*, 17 Abb. Pr. 183; *Tappan v. Powers*, 2 Hall, 277.

5 *Cohn v. Goldman*, 76 N. Y. 284. Disapproving *Ynguanzo v. Salomon*, 3 Daly, 153. Compare *Fay v. Lynch*, 17 N. Y. Week. Dig. 348.

6 *Leavenworth etc. R. R. Co. v. Commissioners etc.* 18 Kan. 169. And see *Wright v. Bourdon*, 50 Vt. 494.

§ 135. *Contracts*.—It is an established rule that an action founded upon neglect of duty cannot be united in the same complaint with actions founded on contracts.¹ But where a complaint sets forth facts constituting a cause of action *ex contractu*, an allegation therein of an incorrect legal conclusion, having the aspect of a tort, does not change the nature of the

action.³ Thus, if the complaint states a good cause of action upon contract, an allegation as to a conversion by the defendant may be rejected as immaterial or as surplusage, in view of the other matters which give character to the action.³ But it is held that where the complaint, after duly setting forth a cause of action on contract, states "that the defendant was guilty of a fraud in contracting and incurring liability, in that," etc., and there are no averments of facts which constitute fraud, such complaint should be dismissed on the trial, upon the ground that it does not state facts sufficient to constitute a cause of action.⁴ A complaint, whether upon a special contract or otherwise, need not set out any facts except such as are material to the plaintiff's cause of action.⁵ It is, in general, sufficient, so far as a demurrer is concerned, to aver in the complaint the contract, the breach complained of, and general damages, for which the plaintiff asks judgment.⁶ But the circumstances attending the contract need not be set forth.⁷ Breach of a contract must be stated in unequivocal language.⁸ In a suit for a money demand upon contract, the complaint must show that the claim, or some part thereof, is due and unpaid;⁹ and an allegation that the sum sued for is now due is not sufficient.¹⁰ But where the general averments of the complaint show that the claim is due and unpaid, the complaint is sufficient without averring such facts in terms.¹¹ A promise to pay money, no time being expressed, is deemed in law a promise to pay on demand;¹² and it is sufficient to plead such a promise as made without pleading the construction which the law places upon it by alleging a promise to pay on demand.¹³ A contract in writing may be declared on according to its legal effect, or *in hæc verba*.¹⁴ If the plaintiff sets out in his complaint the contract sued on

in the terms in which it is written, and then puts a false construction on its terms, the allegation repugnant to its terms should be regarded as surplusage.¹⁵ As against the plaintiff, the presumption is that his complaint correctly states the contract which was the cause of action.¹⁶ When a contract is by parol, though evidenced in part by a writing, it is enough to plead the legal effect of the agreement without giving a copy of the writing.¹⁷ But in pleading a parol contract it is necessary to state as issuable facts the terms and conditions of the contract.¹⁸ If a complaint avers that a contract was made for the sale of real estate, it is not necessary to aver that it was in writing, for the presumption is that it was in writing.¹⁹ And a complaint for the specific performance of a parol contract to convey land is good without averring an agreement to convey, if it allege facts from which the law will imply such an agreement, and also facts which take the case out of the statute of frauds.²⁰ In an action against the vendee of land to recover the purchase money, the complaint must allege a tender of a conveyance.²¹ *Prima facie*, all the obligees must join in an action for breach of a contract running to them jointly, and if any fact takes a case out of the rule it should be alleged in the complaint.²²

1 Booth v. Farmers' etc. Bank, 65 Barb. 457; Bowman v. Purtell, 15 Jones & S. 403; Thompson v. St. Nicholas Bank, 61 How. Pr. 163; Loup v. California etc. R. R. Co. 63 Cal. 97.

2 Greentree v. Rosenstock, 61 N. Y. 583; Conaughty v. Nichols, 42 N. Y. 83. And see Ledwich v. McKim, 53 N. Y. 307.

3 Whereatt v. Ellis, 58 Wis. 625; Conaughty v. Nichols, 42 N. Y. 83.

4 Lawrence v. Foxwell, 17 Jones & S. 273.

5 Rollins v. St. Paul Lumber Co. 21 Minn. 5; Howard v. Chiles, 8 Mon. B. 377.

6 Barber v. Cazalis, 30 Cal. 92; Wolf v. Schofield, 38 Ind. 175; Bowen v. Emmerson, 3 Oreg. 452. Where the plaintiff has fully performed an express contract, he may state his cause of action for the recovery of the amount due him substantially in the form of *indebitatus assumpsit*: Larson v. Schmaus, 31 Minn. 410; Ludlow v. Dole, 62 N. Y. 617.

- 7 *Brown v. Champlin*, 66 N. Y. 214.
- 8 *Moore v. Besse*, 30 Cal. 570; *Branham v. Johnson*, 62 Ind. 259.
- 9 *Green v. Louthain*, 49 Ind. 139; *Goodman v. Gordon*, 87 Ind. 128.
- 10 *Doyle v. Phoenix Ins. Co.* 44 Cal. 264; *Roberts v. Treadwell*, 50 Cal. 520.
- 11 *Aughie v. Landis*, 65 Ind. 419.
- 12 See *Peets v. Bratt*, 6 Barb. 662; *Warren v. Wheeler*, 8 Met. 97.
- 13 *Chamberlain v. Tiner*, 31 Minn. 371.
- 14 *Joseph v. Holt*, 37 Cal. 250.
- 15 *Love v. Sierra Nevada etc. Co.* 32 Cal. 639.
- 16 *Johnson v. Moss*, 45 Cal. 515.
- 17 *Board of Commissioners v. Miller*, 87 Ind. 257. See *Logansport etc. R. R. Co. v. Wray*, 52 Ind. 578.
- 18 *Phillbrook v. Emswiler*, 92 Ind. 590.
- 19 *McDonald v. Mission View etc. Assoc.* 51 Cal. 210; *Vassault v. Edwards*, 43 Cal. 458.
- 20 *Drum v. Stevens*, 94 Ind. 181. Although a statute requires that a contract for the payment of gold coin, to be valid, must be in writing, yet the rules of pleading in such cases do not require the complaint to allege that such agreement was in writing: *Taylor v. Patterson*, 5 Oreg. 121; but if questioned or denied it must be proved on the trial by the writing: *Russell v. Swift*, 5 Oreg. 233.
- 21 *Bohall v. Diller*, 41 Cal. 532.
- 22 *Hedderly v. Downs*, 31 Minn. 183.

§ 136. **Conversion—Complaint.**—Conversion is defined to be an unauthorized act, which deprives another of his property permanently or for an indefinite time.¹ Any unlawful interference with the property of another, or exercise of dominion over it, whereby the owner sustains damage, is sufficient to give the right of action.² And an allegation in a complaint in an action of conversion, that the defendant “converted” the property in question to his own use, is an allegation of fact, and is sufficient;³ and the plaintiff is not bound to allege the particular act or acts which constitute the conversion complained of.⁴ And an allegation that the defendant took and carried away the goods, is equivalent to alleging that he converted them to his own use.⁵ But an averment that the defendant unlawfully, fraudulently, willfully, and maliciously took the property is not an averment of a conversion.⁶ It is sufficient if the plaintiff

alleges ownership generally, and he need not set out facts showing his title.⁷ But a complaint for conversion, alleging the plaintiff's ownership in the present tense, and not as of the time of the conversion, is insufficient.⁸ And so of a complaint alleging that the plaintiff was entitled to the possession.⁹ If there is no allegation of ownership by the plaintiff, the complaint fails to state a cause of action.¹⁰ But allegation of an actual possession in the plaintiff, and wrongful detention from him, is sufficient, the term "possession" importing a holding by lawful title.¹¹ One in possession as administrator may sue in his own name, for a conversion of the goods of his intestate converted after his death, without setting forth in the complaint his official and representative capacity;¹² but for a conversion during the lifetime of the intestate, the complaint must state the fact that the plaintiff is administrator.¹³ It is usual to allege the value of the property converted,¹⁴ but the failure to do so will be cured by a verdict for the plaintiff.¹⁵ So the property should be described with reasonable certainty;¹⁶ and demand and refusal should be averred where the defendant has come rightfully into possession.¹⁷ The general rule as to the measure of damages in an action for conversion is the value of the property at the time of its conversion, with interest.¹⁸ If the facts stated in the complaint disclose a good cause of action for a conversion, the plaintiff may recover damages as in such an action, although the relief asked is for the possession of the property or its value.¹⁹ So one whose goods have been wrongfully converted may elect to waive the tort, and sue on the implied contract.²⁰ But it is held that in order to sue for money had and received in such case, the plaintiff must allege and show that the goods have been disposed of by the wrong-doer for value;²¹ and it is also held

that he can only recover the amount actually received by the defendant.²² A complaint in an action for the conversion of notes may both allege a tort and set up a claim for money had and received.²³ Thus, where notes had been made for a special purpose, and placed in the hands of one who, having knowledge of such purpose and receiving the notes under an engagement to apply them thereto, used them for another purpose, it was held that he might be sued in an action in which the complaint contained the necessary averments to sustain the action, either as one in tort for a conversion, or on contract for money had and received.²⁴

1 *Hort v. Bott*, Law R. 9 Ex. 88. And see *Fouldes v. Willoughby*, 8 Mees. & W. 540.

2 *Latimer v. Wheeler*, 30 Barb. 485; 1 Keyes, 463; *Gillet v. Roberts*, 57 N. Y. 23; *Pease v. Smith*, 5 Lans. 519; 61 N. Y. 477; *Boyce v. Brockway*, 31 N. Y. 490.

3 *Decker v. Mathews*, 12 N. Y. 313; *Berney v. Drexel*, 33 Hun, 34; 19 N. Y. Week. Dig. 348; *Johnson v. Ashland Lumber Co.* 45 Wis. 119; *Edwards v. Sonoma Valley Bank*, 59 Cal. 136.

4 *Berney v. Drexel*, 33 Hun, 34; 63 How. Pr. 471; 19 N. Y. Week. Dig. 343; *Otero v. Bullard*, 3 Cal. 189; *Green v. Palmer*, 15 Cal. 411.

5 *Hutchings v. Castle*, 48 Cal. 152.

6 *Triscony v. Orr*, 43 Cal. 612. See *Kissam v. Roberts*, 6 Bosw. 154.

7 *Heine v. Anderson*, 2 Duer, 318; *Sturman v. Stone*, 31 Iowa, 115; *Stall v. Wilbur*, 77 N. Y. 153; *Harvey v. McAdams*, 32 Mich. 472; *Wright v. Field*, 64 How. Pr. 117; *Swift v. James*, 50 Wis. 540.

8 *Smith v. Force*, 31 Minn. 119.

9 *Bond v. Mitchell*, 3 Barb. 304.

10 *Wright v. Field*, 64 How. Pr. 117; *Johnson v. Oregon Steam. Nav. Co.* 8 Oreg. 35.

11 *Sheldon v. Hoy*, 11 How. Pr. 11. See *Bowen v. Fenner*, 40 Barb. 383; *Frost v. Mott*, 34 N. Y. 253; *Davis v. Morrell*, 16 N. Y. Week. Dig. 530.

12 *Munch v. Williamson*, 24 Cal. 167; *Sheldon v. Hoy*, 11 How. Pr. 11.

13 *Sheldon v. Hoy*, 11 How. Pr. 11.

14 See *Jones v. Rahilly*, 16 Minn. 320; *Connors v. Meir*, 2 Smith, E. D. 314.

15 *Jefferson v. Hale*, 31 Ark. 286.

16 *Pierson v. Townsend*, 2 Hill, 530; *Edgerly v. Emerson*, 23 N. H. 555.

17 See *Gillet v. Roberts*, 57 N. Y. 23; *Root v. Bonnema*, 22 Wis. 539; *Proctor v. Cole*, 68 Ind. 576; *Kronschable v. Knoblanck*, 21 Minn. 56; *Pugh v. Calloway*, 10 Ohio St. 483; *Ryerson v. Kauffield*, 13 Hun, 389;

Smith v. Kennett, 18 Mo. 154; *Berney v. Drexel*, 63 Low. Pr. 471; 33 Hun, 34.

18 *Jefferson v. Hale*, 31 Ark. 286; *Skinner v. Pinney*, 19 Fla. 42; *Coffey v. National Bank*, 46 Mo. 140; *McCormick v. Railroad Co.* 49 N. Y. 303; *Shepard v. Pratt*, 16 Kan. 209. Compare *Lobdell v. Stowell*, 51 N. Y. 70; *Railway Co. v. Hutchins*, 32 Ohio St. 571.

19 *Washburn v. Mendenhall*, 21 Minn. 332; *Morish v. Mountain*, 22 Minn. 564.

20 *Gordon v. Bruner*, 49 Mo. 570; *Kalckhoff v. Zoehrlaut*, 40 Wis. 427.

21 *Cushman v. Jewell*, 7 Hun, 525; *Chamblee v. McKenzie*, 31 Ark. 153. But see *Abbott v. Blossom*, 66 Barb. 353.

22 *Howell v. Graves*, 27 Ark. 365. And see *Hudson v. Gilliland*, 25 Ark. 100; *Pratt v. Cork*, 12 Cal. 90.

23 See *Comstock v. Hler*, 75 N. Y. 269; *Thayer v. Manley*, 73 N. Y. 305; *Murray v. Burling*, 10 Johns. 172.

24 *Hynes v. Patterson*, 23 Hun, 528. If one entitled to maintain an action for conversion elects to accept the proceeds of the sale of the property converted, by suing therefor, he cannot claim also the value of the property: *Nichols v. Gage*, 10 Oreg. 82.

§ 137. **Conversion — Answer.** — In an action for the conversion of property, an answer which denies each and every allegation in the complaint is a denial not only of the conversion, but of the plaintiff's title, and under it evidence that the plaintiff had no title to the property is admissible.¹ The defendant need not, therefore, plead as an affirmative defense that he owned the property at the commencement of the action, nor show the source of or mode by which he acquired title, a general denial of the plaintiff's ownership being sufficient.² And under a general denial, he may show that at the time of the alleged conversion of the property the ownership and right of possession were in a third person.³ But according to the general tenor of authority, he cannot set up title to the property in a third person unless he connects himself in some manner with that title.⁴ If the owner of property is deprived of its possession, and forcibly regains it, he may, in an action against him for conversion, and as a full defense thereto, show his title to the property.⁵ An answer in an action for the conversion of property seized by a sheriff under a writ of

attachment, which contains a justification as a defense, but fails to allege that the attachment defendant was the owner of the property, is deficient and irrelevant;⁶ an allegation that the property was levied upon under the writ, "as the property" of the attachment defendant, is not a sufficient allegation of ownership to justify the levy.⁷ A general denial and justification as a defense are inconsistent, and cannot be pleaded to the same cause of action for a conversion;⁸ but if so pleaded, there is no necessity for a motion to strike out, or to compel the party to elect by which he will abide, as the denial is controlled by the admission of the taking, and justifying it.⁹ In an action for the conversion of a note, it is competent for the defendant to show in reduction of damages, under a general denial, the inability of the maker to pay wholly or partially.¹⁰ And in an action for the conversion of a canal boat, it was held that conduct of the plaintiff amounting to an estoppel to claim title to the boat might have been given in evidence on the question of title without being specially pleaded.¹¹

1 *Robinson v. Frost*, 14 Barb. 536. Compare *Jones v. Rahilly*, 16 Minn. 320; *Willard v. Giles*, 24 Wis. 319; *Beaty v. Swarthout*, 32 Barb. 223; *Wallace v. Robb*, 37 Iowa, 102; *Sparks v. Heritage*, 45 Ind. 68; *Jacobs v. Remsen*, 12 Abb. Pr. 390; *Wehle v. Butler*, 12 Abb. Pr. N. S. 139; 43 How. Pr. 5.

2 *Brevoort v. Brevoort*, 8 Jones & S. 211. Under a general denial the defendant may prove that he had a mortgage on the property: *Schoenrock v. Farley*, 17 Jones & S. 302.

3 *Davis v. Hoppock*, 6 Duer, 254. And see *Hall v. Stryker*, 27 N. Y. 536; *Rinchev v. Stryker*, 26 How. Pr. 75; 23 N. Y. 45. An answer which alleges that the defendant took the property, as constable, under an execution against a third party, in whose possession it was, but which does not rebut the allegation that it was the property of the plaintiff, is insufficient: *Barley v. Cannon*, 17 Mo. 595.

4 *Weymouth v. Railroad Co.* 17 Wis. 550; *Moore v. Aldrich*, 25 Tex. Supp. 276; *Skinner v. Pinney*, 19 Fla. 42. See *Stowell v. Otis*, 71 N. Y. 36. In replevin the defendant may, by answer, defend, on the ground that a third person was entitled to the chattel, without connecting himself with the latter's title: N. Y. Code Civ. Proc. § 1723; *Ingraham v. Hammond*, 1 Hill, 353.

5 *Alsbrook v. Shields*, 67 N. C. 333.

6 *Krewson v. Purdom*, Sup. Ct. Oreg. 3 Pacif. L. Rep. 822; 11 Oreg. 268.

7 *Barley v. Cannon*, 17 Mo. 595; *Richardson v. Smith*, 29 Cal. 527; *Krewson v. Purdom*, Sup. Ct. Oreg. 3 Pacif. L. Rep. 822; 11 Oreg. 268.

8 *Zimmerman v. Lamb*, 7 Minn. 421.

9 *Derby v. Gallup*, 5 Minn. 119.

10 *Booth v. Powers*, 56 N. Y. 22, 27. But see *Burrows v. Keays*, 37 Mich. 430.

11 *Rogers v. King*, 66 Barb. 495.

138. Corporations—Complaint.—Unless it be otherwise expressly provided,¹ it is not necessary in an action by a corporation to aver in the complaint that the plaintiff is a corporation.² It is sufficient if the name be stated in the caption.³ And even when the averment is required, if no objection to its omission from the complaint or petition is made by answer or otherwise until after judgment, the defect is held to be waived.⁴ And the omission is supplied by an allegation in the answer that the defendant contracted with the plaintiff in its corporate name.⁵ In a suit against a corporation, it may be designated by its corporate name, without an averment of its corporate capacity, and if this is disputed, it should be by answer and not by demurrer.⁶ The allegation that the plaintiff is a corporation, organized and existing under the laws of the State, is sufficient to establish the legal capacity to sue.⁷ In an action by a corporation, an allegation in the complaint that the "plaintiff and defendant entered into an agreement to and with each other," etc., includes and implies the plaintiff's capacity and power to make the agreement.⁸ An averment in a complaint in an action against the directors of a corporation, that the "defendants as directors of said corporation *pretended* to have received and expended, in the name of and on behalf of said corporation, large sums of money, and incurred large liabilities," is not equivalent to the averment that they did in fact receive money and incur

liability, and is insufficient.⁹ So if the plaintiff chooses to allege that a corporation by its officers and agents makes false representations, his complaint should declare specifically the particular officers or agents by whom he claims such representations were made;¹⁰ and a complaint which alleges that the defendant "by its officers and agents" made divers representations, which the complaint claims to have been false, is held to be bad pleading.¹¹ As a general rule, in a suit by a corporation, every fact necessary to the existence thereof need not be alleged, either generally or specifically.¹² The pleader is not required to allege in his complaint every fact necessary to the original organization of the corporation, or anticipate supposed defenses growing out of irregularities occurring in or after the election of directors.¹³ If the complaint alleges a corporate existence in the plaintiff, and no facts or circumstances appear upon the face of the complaint showing in the plaintiff a want of corporate authority, or of capacity to sue, a demurrer to the complaint cannot be sustained.¹⁴ And a complaint which avers that the defendants and others whose names are not known are stockholders, and that it is impracticable from their great number to bring them all before the court, is not demurrable for defect of parties, since in such case one may sue or be sued for all the others.¹⁵ An allegation that the defendant "is a corporation, duly organized and doing business as such" in a certain State, is equivalent to an averment that such defendant is a corporation duly organized in such State.¹⁶ In an action on a contract of subscription to stock of a corporation, containing a condition precedent, the plaintiff must aver performance to show a cause of action against the subscriber;¹⁷ or he must aver all the facts necessary to show a waiver of the condition precedent,

and to fix the defendant's liability, notwithstanding the non-performance.¹⁸

1 See N. Y. Code Civ. Proc. § 1775; *Smith v. Sewing Machine Co.* 26 Ohio St. 562; *Irving Nat. Bank v. Corbett*, 10 Abb. N. C. 85.

2 *Lafayette Ins. Co. v. Rogers*, 30 Barb. 491; *Phoenix Bank v. Donnell*, 40 N. Y. 410; *Union Cement Co. v. Noble*, 15 Fed. Rep. 592. And see § 81, *ante*.

3 *Union Cement Co. v. Noble*, 15 Fed. Rep. 592; *Harris Manuf. Co. v. Marsh*, 49 Iowa, 11; *Wendall v. Osborne*, 63 Iowa, 101.

4 *Spence v. Insurance Co.* 40 Ohio St. 517.

5 *Smith v. Sewing Machine Co.* 26 Ohio St. 562; *Loaners' Bank v. Jacoby*, 10 Hun, 143; *Johnson v. Gibson*, 73 Ind. 232; *Mackenzie v. Board of School Trustees*, 72 Ind. 189; *Farmers' etc. Ins. Co. v. Needles*, 52 Mo. 17.

6 *Stanly v. Richmond etc. R. R. Co.* 89 N. C. 331. See *Irving Nat. Bank v. Corbett*, 10 Abb. N. C. 85; *Walsh v. Trustees etc.* 96 N. Y. 427; *Baker v. Star Printing Co.* 3 Month. Law Bull. (N. Y.) 27; *Crane Brothers' Manuf. Co. v. Reed*, 3 Utah, 506; *Tolmie v. Deau*, 1 Wash. T. 46; *Smith v. Weed Sewing Machine Co.* 28 Ohio St. 563.

7 *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 258; *Savings Bank v. Horn*, 41 Iowa, 55; *Dodge v. Minn. etc. Co.* 14 Minn. 49; *Chillicothe Sav. Assoc. v. Ruegger*, 60 Mo. 218; 8 Am. Corp. Cas. 143.

8 *La Grange Mill Co. v. Bennewitz*, 28 Minn. 62. And see *State v. Torinus*, 22 Minn. 272.

9 *Hewlett v. Epstein*, 63 Cal. 184.

10 *Schellens v. Equitable Life Assur. Soc.* 32 Hun, 255.

11 *Schellens v. Equitable Life Assur. Soc.* 32 Hun, 255.

12 *State v. Stout*, 61 Ind. 143.

13 *Washer v. Turnpike Co.* 81 Ind. 73. And see *Steinmetz v. Turnpike Co.* 57 Ind. 457; *James v. Turnpike Co.* 47 Ind. 379; *Atherton v. Turnpike Co.* 67 Ind. 334; *Fox v. Turnpike Co.* 46 Ind. 81.

14 *Cheraw etc. R. R. Co. v. White*, 14 S. C. 51; *Cheraw etc. R. R. Co. v. Garland*, 14 S. C. 63. See § 43, *ante*.

15 *Bronson v. Insurance Co.* 85 N. C. 411. And see *Hughes v. Whitaker*, 84 N. C. 640; *Glenn v. Bank*, 72 N. C. 636; *Von Glahn v. De Rosset*, 81 N. C. 467.

16 *Little v. Virginia etc. Water Co.* 9 Nev. 317.

17 *Livesey v. Omaha Hotel Co.* 5 Neb. 50; 8 Am. Corp. Cas. 312.

18 *Livesey v. Omaha Hotel Co.* 5 Neb. 50; 8 Am. Corp. Cas. 312. And see *Estabrook v. Omaha Hotel Co.* 5 Neb. 76; *Balcombe v. Omaha Hotel Co.* 5 Neb. 83. In an action to charge a stockholder with an indebtedness of the corporation, on the ground that the capital stock has not been fully paid in, it is not necessary that the defendant's indebtedness to the corporation should be pleaded, it not being required of the plaintiff to anticipate the defense: *Wheeler v. Millar*, 90 N. Y. 353; 9 Am. Corp. Cas. 647. Where a corporation (a railroad company) has, under a general statute, though not by charter, authority to guarantee the payment of the bonds of another such company, in an action upon the guaranty, it is not necessary to set forth in the pleading such authority for making the indorsement;

Toppan v. Cleveland etc. R. R. Co. 1 Flip. C. C. 74. In an action by a stockholder, as such, to have redressed alleged wrongs of the officers of the corporation, the refusal of the corporation to bring such an action must be alleged: *Leslie v. Lorillard*, 31 Hun, 305. Compare *Barr v. Railroad Co.* 53 N. Y. 444.

‡ 139. **Corporations—Answer.**—Under the common-law system of pleading, it was the rule in England and in some of the States, that the defendant might join issue on the fact of the plaintiff's corporate capacity by pleading the general issue.¹ In other States this could only be done by a special plea in abatement or bar;² and a plea of the general issue was an admission of the corporate existence of the plaintiff.³ So in some of the States which have adopted Codes, a general denial or plea of the general issue does not put in issue the corporate existence of a corporate plaintiff, nor its right to sue, and this can only be done by demurrer, or by special denial in the nature of a plea in abatement.⁴ In New York, in an action by or against a corporation, the plaintiff need not prove upon the trial the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff or the defendant, as the case may be, is not a corporation.⁵ Under this provision, it is held that an allegation in an answer upon information and belief, that a defendant is not and never was a corporation, does not put in issue the incorporation of the defendant.⁶ So, in an action by a corporation, a denial in the answer of knowledge or information sufficient to form a belief as to whether the plaintiff is a corporation, will not impose upon the plaintiff the necessity of proving on the trial its corporate existence.⁷ The plea of *nul tiel corporation* is a proper plea in a suit by a corporate body, when it is denied there is any such body.⁸ But where an answer of *nul tiel corporation* admits the previous existence of a corporation, and alleges no facts sufficient to show

that it has ceased to exist, it will be presumed that it is still a corporation, and in the possession of its corporate rights, property, and franchises.⁹ Under such plea it is sufficient for the corporation to prove that it is known and transacts business under the corporate name in which the suit is assumed to be brought, or is a corporation *de facto*, and it is not necessary to show that the plaintiff is a corporation *de jure*, as in case of a *quo warranto*.¹⁰ It is held that a defendant sued as a corporation cannot deny its own existence, either in abatement or in bar;¹¹ if it is not a corporation, it cannot, as such, appear and plead.¹² When brought into court by its corporate name, its existence as a corporation is admitted.¹³ And where an action is brought against a defendant by a name implying a corporation, and in that name such defendant forms an issue by general denial, and goes to trial, it is not necessary for the plaintiff to introduce any evidence of the existence of the corporation.¹⁴ A demurrer to a complaint by a plaintiff, styled "the trustees of a certain "church," questioning its sufficiency, admits the organization, and the plaintiff's capacity to sue;¹⁵ nor is such plaintiff's corporate existence put in issue by an answer of general denial, nor by an answer specially alleging that certain persons named in the complaint as such trustees are, in fact, not the trustees.¹⁶ Where the act incorporating the plaintiff is set out in the complaint or petition, and its passage is not denied, a denial that the plaintiff is a corporation is properly stricken out of the answer.¹⁷ And it is held that when an answer sets up a defense in bar, and also denies "that the plaintiff is a corporation duly organized," the denial will be stricken out.¹⁸ In an action by a foreign corporation on a contract made with it, an answer under oath, that "the plaintiff had not complied with the provisions of

an act of the general assembly" respecting foreign corporations, lacks the precision and certainty of a plea in abatement, and stating not facts, but a conclusion only, is insufficient to bar the action.¹⁹ It has been held that where the representative of a railroad corporation is served with process, he may plead in abatement in his own name that the corporation is extinct;²⁰ and where a person is so served with process he may, by plea, deny that he sustains any such relation to the corporation as authorizes the service of process on him.²¹ An action begun by a corporation cannot be defeated on the ground that the officers of the corporation were not legally elected.²² If it is sought to raise the question of the corporate power of a party to an action, it must be specially pleaded, and cannot be first raised on appeal.²³ The trustees of a corporation who signed the certificate of incorporation, and accepted the office of trustees, are estopped from denying the validity of the act of incorporation.²⁴

1 Bank of Auburn v. Weed, 19 Johns. 303; Rees v. Conococheague Bank, 5 Randf. 326; Cent. Land Co. v. Calhoun, 16 W. Va. 361, 375; Jackson v. Plumbie, 8 Johns. 295; McDonald v. Neilson, 2 Cowen, 139. And see Gott v. Adams' Express Co. 100 Mass. 321. The rule is so in Texas: Holloway v. Railroad Co. 23 Tex. 465.

2 Society etc. v. Pawlett, 4 Peters, 501; Brown v. Illius, 27 Conn. 84; Sutton v. Cole, 3 Pick. 245; Bank of Manchester v. Allen, 12 Vt. 306.

3 Prince v. Commercial Bank, 1 Ala. 241; Litchfield Bank v. Church, 20 Conn. 148; Orono v. Wedgewood, 44 Me. 49; Dental Vulcanite Co. v. Wetherbee, 2 Cliff. 555.

4 See Nat. Life Ins. Co. v. Robinson, 8 Neb. 452; Wiles v. Trustee etc. 63 Ind. 206; 7 Am. Corp. Cas. 85; Blackshire v. Iowa Homestead Co. 39 Iowa, 624; Coates v. Railroad Co. 18 Iowa, 277; Stanly v. Railroad Co. 85 N. C. 331.

5 N. Y. Code Civ. Proc. § 1776.

6 Bengston v. Thingvalla Steamship Co. 3 Civ. Proc. R. 263; 4 Civ. Proc. R. 260; 18 N. Y. Week. Dig. 411; 31 Hun, 96.

7 Concordia Sav. Assoc. v. Read, 93 N. Y. 474; First Nat. Bank v. Loyhed, 28 Minn. 396; 8 Am. Corp. Cas. 11. Compare Ansonia etc. Copper Co. v. Conner, 13 N. Y. Week. Dig. 87.

8 Osborne v. People, 103 Ill. 224; 9 Am. Corp. Cas. 153.

9 Darrell v. Gravel Road Co. 90 Ind. 263; Heaston v. R. R. Co. 16 Ind. 273.

10 *Osborne v. People*, 103 Ill. 224; 9 Am. Corp. Cas. 153. If it does not appear from the pleading that the plaintiffs sued as a corporation, the plea of *not a corporation* is irrelevant, and subject to be stricken out: *Ware v. St. Louis Bagging & Rope Co.* 47 Ala. 667.

11 *Western Union Tel. Co. v. Eyser*, 2 Colo. 141. See *Greenwood v. Railroad Co.* 10 Gray, 374; *Northumberland Co. Bank v. Eyer*, 60 Pa. St. 439; *Oxford Co. v. Spradley*, 46 Ala. 98; *Gulf R. R. Co. v. Shirley*, 20 Kan. 660.

12 *West. Union Tel. Co. v. Eyser*, 2 Colo. 141. But see *Thornton v. Railroad Co.* 123 Mass. 32; *Foster v. White Cloud*, 32 Mo. 505; *Hobich v. Folger*, 20 Wall. 1; *Boyce v. M. E. Church*, 46 Md. 359; *Folsom v. Star Union etc. Freight Line*, 54 Iowa, 490.

13 *Mud Creek Drain. Co. v. State*, 43 Ind. 236.

14 *Adams' Express Co. v. Hill*, 43 Ind. 157. And see *Johnson v. Gibson*, 73 Ind. 282; *Ewing v. Robeson*, 15 Ind. 26; *Callender v. Railroad Co.* 11 Ohio St. 516; *Com. Ins. etc. Co. v. Taylor*, 8 S. C. 107. Compare *Ware v. St. Louis Bagging & Rope Co.* 47 Ala. 667.

15 *Wiles v. Trustees etc.* 63 Ind. 207.

16 *Wiles v. Trustees etc.* 63 Ind. 207.

17 *Board of Commissioners v. Shields*, 4 Mo. App. 579.

18 *Oreg. Cent. R. R. Co. v. Scoggin*, 3 Oreg. 161. And see *Hopwood v. Patterson*, 2 Oreg. 49.

19 *Singer Manuf. Co. v. Effinger*, 79 Ind. 264. And see *Singer Manuf. Co. v. Brown*, 64 Ind. 548; *Daly v. Nat. Life Ins. Co.* 64 Ind. 1. A defendant corporation "is found" within a district where it is sued, whenever it does business there by authority of law: *Blackburn v. Railroad Co.* 2 Filp. C. C. 525.

20 *Kelley v. Railroad Co.* 2 Filp. C. C. 581. And see *Callender v. Painesville Co.* 11 Ohio St. 516; *Quarrier v. Peabody Co.* 10 W. Va. 507; *Everts v. Killingworth Co.* 20 Conn. 447; *Stewart v. Dunn*, 12 Mees. & W. 655; *Stevenson v. Thorn*, 13 Mees. & W. 149.

21 *Kelley v. Railroad Co.* 2 Filp. C. C. 581.

22 *Carrothers v. Newton Mineral Spring Co.* 61 Iowa, 681.

23 *Commercial Bank v. King*, 47 Iowa, 64.

24 *Parrott v. Byers*, 40 Cal. 614. A claim that a defendant sued as a corporation is estopped by its acts and course of dealing to deny its corporate capacity must be specially pleaded: *Folsom v. Star Union etc. Freight Line*, 54 Iowa, 490. Where the petition in an action upon a note and mortgage alleged that they were executed by the duly authorized board of trustees of the defendant, a corporation, an answer denying that either note or mortgage were executed or made in any way by the defendant was held sufficient to put in issue their validity: *Babbage v. Second Baptist Church*, 54 Iowa, 172. In an action against several persons alleged to be associated together as bankers, to recover on their alleged joint undertaking, an answer admitting the association and the undertaking, but averring that the association at the date of the undertaking was, and still is, a body corporate, and that the undertaking is the corporate contract of the association, may be regarded as setting up new matter constituting a defense: *Ridenour v. Mayo*, 29 Ohio St. 138. And a reply to such answer which denies the corporate character of the contract, without denying the corporate existence of the association, is sufficient on general demurrer: *Ridenour v. Mayo* 29 Ohio St. 138. The answers made by a defendant corporation to interrogations filed with the complaint are proper evidence for the plaintiff: *Louisville etc. Railway Co. v. Henly*, 83 Ind. 535.

§ 140. **Damages.**—It is the well-established general rule, that when damages are special and do not necessarily accrue from the act complained of, the facts out of which they arise must be specially averred in the pleading.¹ Thus, in an action for the breach of a contract, if no special damages are alleged, the plaintiff's recovery is limited to such damages as naturally arise from the breach ;² and such damages as are not implied by law from a breach of the contract sued upon must be set out in the pleading.³ But in alleging such special damages, it is only necessary to particularly specify the items.⁴ An averment of special damage is only necessary where the right of action itself depends upon the special injury received.⁵ And if the complaint properly alleges a breach of the agreement by the defendant, the general allegation that the plaintiff was damaged by such breach in a gross sum is a sufficient allegation of damages to sustain the complaint on demurrer.⁶ In a suit against a tenant holding over under the statute, special damages not alleged cannot be shown in evidence.⁷ So the rule that damages not implied by law from breach of contract must be specially alleged, was held to be applicable to a contract of sale, where the buyer claims that by reason of the failure of the seller to deliver according to agreement, he has been unable to fulfill a contract of re-sale to another at an increased price.⁸ But it is held that exemplary damages are not the subject of a claim, in the sense that it is necessary to make an averment thereof in the petition, and such damages may, in a proper case, be allowed by the jury without any such averment.⁹ But if pleaded, claims for compensatory and for exemplary damages should be severed in the pleading, and in their submission to the jury.¹⁰ Evidence of the damages suffered by the plaintiff, in an action for personal injuries, is admissible,

although the defendant's counsel states in open court that the allegations of the complaint in respect to damages are admitted by the answer, if such statement were not true.¹¹ When treble damages are given by a statute, the demand for such damages must be inserted in the pleading, which must either recite the statute, or conclude to the damage of the plaintiff against the form of the statute.¹² A complaint founded on such statute, and claiming such damages, may be amended so as to claim single instead of treble damages, this not being a change of the cause of action.¹³ So if averments of special damage are not originally inserted in the complaint, it may be allowed to be done by amendment on the trial, when no injury will result to the defendant from it.¹⁴ Allegation of special damage is not traversable matter, but is required to be inserted in the complaint in order that the defendant may be prepared with evidence to rebut the proof offered of such damage, or the amount or extent of it.¹⁵ In an action on breach of a money contract, the law implies damages to the legal rate of interest on the sum due, and an allegation of damages is not only unnecessary, but inadmissible.¹⁶ The burden of proof to establish damages sustained rests upon the plaintiff, and the defendant is not required to allege that the plaintiff has suffered no damage.¹⁷ It seems that under the New York Code of Civil Procedure,¹⁸ in an action for personal injury, facts in mitigation of damages cannot be given in evidence unless set forth in the answer.¹⁹

1 *Stevenson v. Smith*, 28 Cal. 102. And see § 18, *ante*.

2 *Lindley v. Dempsey*, 45 Ind. 247; *Olmstead v. Burke*, 25 Ill. 86; *Taylor v. Maguire*, 13 Mo. 517; *Fleming v. Beek*, 48 Pa. St. 309.

3 *Jutte v. Hughes*, 67 N. Y. 268; *Parsons v. Sutton*, 66 N. Y. 92; *Bristol Manuf. Co. v. Gridley*, 23 Conn. 201; *Hallock v. Belcher*, 42 Barb. 199; *Hunter v. Stewart*, 47 Me. 419.

4 *Herfort v. Cramer*, 7 Colo. 483; 4 *Pacif. L. Rep.* 901.

5 *McCarty v. Beach* 10 Cal. 461.

- 6 *Willson v. Clarke*, 20 Minn. 367; *McCarty v. Beach*, 10 Cal. 461.
- 7 *Rothschild v. Williamson*, 83 Ind. 387.
- 8 *Torrey v. Roberts*, N. Y. City Ct. Abb. An. Dig. (1884) 267. And see *Booth v. Spuyten Duyvil R.R. Mill Co.* 60 N. Y. 487.
- 9 *Gustafson v. Wind*, 62 Iowa, 281.
- 10 *Zelliff v. Jennings*, 61 Tex. 458.
- 11 *Payne v. Kripp*, Sup. Ct. Cal. 3 West C. Rep. 424.
- 12 *Chipman v. Emeric*, 5 Cal. 239; *Neff v. Pennoyer*, 3 Sawy. 495.
- 13 *Rhemke v. Clinton*, 2 Utah, 230. See *Starkweather v. Quigley*, 7 Hun, 26.
- 14 *Miller v. Garling*, 12 How. Pr. 203; *Lounsbury v. Purdy*, 18 N. Y. 521; *Baldwin v. N. Y. etc. Nav. Co.* 4 Daly, 314.
- 15 *Vanderslice v. Newton*, 4 N. Y. 130; *Molony v. Dows*, 15 How. Pr. 265; *Baldwin v. N. Y. etc. Nav. Co.* 4 Daly, 314. And see *Hooper v. Armstrong*, 69 Ala. 343.
- 16 *Talcott v. Marston*, 3 Minn. 339.
- 17 *Wolf v. Gerr*, 43 Iowa, 339.
- 18 § 536.
- 19 *Bradner v. Faulkner*, 93 N. Y. 515.

§ 141. **Divorce—Complaint.**—In an action for divorce, the complaint or petition should contain allegations of every fact, the existence of which is made necessary by the statute in order to the granting of the divorce.¹ It is, however, sufficient to plead the facts without adding mere conclusions of law, and it is not necessary to use the language of the statute in setting forth causes for a divorce.² If the allegations of the complaint are sufficient to give the court jurisdiction of the case, and to grant a divorce under its discretionary power, the defendant cannot avail of mere circumstantial omissions to defeat the action by demurrer.³ An actual marriage should be stated, and not a mere agreement to marry.⁴ In an action for divorce on the ground of adultery, the allegation of adultery must not be too general;⁵ and the complaint or petition must set forth, with particularity sufficient to identify them, the time, place, and occasion of the acts charged.⁶ So it is necessary to state the name of the person with whom the adultery was committed, if it is known, and if the person is unknown,

that fact should be stated.⁷ As it regards place, it is not sufficient to say "various houses of prostitution in the city of New York, which plaintiff cannot particularize."⁸ But a time certain as to when an alleged act of adultery was committed need not be stated, when the name of the person with whom, and the place at which the offense is alleged to have been committed, are set forth;⁹ in such case, an allegation that the offense was committed on different days, in specified months of specified years, will be sufficient.¹⁰ And a complaint which avers the commission of adultery with a person whose name is unknown to the plaintiff, at times between specified dates, and in a town or city named, with an allegation that the plaintiff is unable to state more particularly the times and places, is held to be sufficient.¹¹ The plaintiff may be required to furnish a bill of particulars in certain circumstances, but it is not allowed, as a matter of course, where the complaint does not state the times when, or the name of the party with whom, the acts of adultery were committed.¹² A charge in a petition for divorce of excesses or cruel treatment alleged to have been committed between specified dates, without designating the place, is held to be sufficiently specific.¹³ A complaint alleging that the defendant has abandoned his wife and turned her out of doors, that he has treated her cruelly and barbarously so as to endanger her life, and has offered such indignities to her person as to render her condition intolerable and life burdensome, states facts constituting a cause of action under the North Carolina statute.¹⁴ A cause of action for divorce on the ground of adultery cannot properly be united with one for a limited divorce on the ground of cruel treatment.¹⁵ And charges of adultery on the part of the defendant have no place in a complaint which prays for a decree of separation, and will be

stricken out on motion;¹⁶ and so of an allegation of abandonment in a complaint for divorce on the ground of adultery.¹⁷ But allegations in a complaint praying a separation, of frequent intoxication and of filthy habits on the part of the defendant, are appropriate to the charge of cruel and inhuman treatment, and will not be stricken out.¹⁸ And it is held that where the complaint states facts warranting a judgment for divorce and alimony, and not facts warranting an annulling of the marriage, and the prayer is for both forms of relief, the action is to be treated as one for divorce and alimony.¹⁹ Where a divorce is prayed on the ground that the defendant "is habitually intemperate," it is not necessary to specify more definitely the facts constituting "habitual intemperance."²⁰ In an action for divorce by the wife against the husband, if the complaint alleges that the husband drove his wife out of his house, and that he lives in adultery with another woman, this is equivalent to an allegation that he "abandoned her," etc.²¹ Where a statute requires that the applicant for a divorce shall be a resident of the State for a certain prescribed time prior to making the application for a divorce, the fact of such residence must be alleged in the complaint, and established by proof.²²

1 *Morris v. Morris*, 75 N. C. 168; *Bennett v. Bennett*, 28 Cal. 509; *Washburn v. Washburn*, 9 Cal. 476; *Conant v. Conant*, 10 Cal. 249; *White v. White*, 45 N. H. 121; *Edwards v. Edwards*, 9 Phila. 617; *Eppling v. Eppling*, 1 Bush, 74.

2 *Murphy v. Murphy*, 95 Ind. 430. But see *Edwards v. Edwards*, 9 Phila. 617.

3 *Huston v. Huston*, 63 Me. 134.

4 *Brinckle v. Brinckle*, 10 Phila. 1.

5 *Germond v. Germond*, 6 Johns. Ch. 347; *Wood v. Wood*, 2 Palge, 108. And see *Clark v. Clark*, 7 Robt. 276; *Hyde v. Hyde*, 4 Sand. 602.

6 *Morrell v. Morrell*, 1 Barb. 318; *Randall v. Randall*, 31 Mich. 174; *Mills v. Mills*, 18 N. J. Eq. 445; *Miller v. Miller*, 20 N. J. Eq. 445; *Wright v. Wright*, 3 Tex. 168.

7 *Germond v. Germond*, 6 Johns. Ch. 347; *Morrell v. Morrell*, 1 Barb. 318; *Holston v. Holston*, 23 Ala. 777.

8 *Cardwell v. Cardwell*, 12 Hun, 92. And see *Tim v. Tim*, 16 Abb. Pr. N. S. 39.

9 *Black v. Black*, 26 N. J. Eq. 431.

10 *Black v. Black*, 26 N. J. Eq. 431; *Marsh v. Marsh*, 16 N. J. Eq. 391; *Goodwin v. Goodwin*, 23 N. J. Eq. 210.

11 *Mitchell v. Mitchell*, 61 N. Y. 398.

12 *Ansert v. Ansert*, 2 N. Y. Month. Law Bull. 19.

13 *Jones v. Jones*, 60 Tex. 451; *Wright v. Wright*, 6 Tex. 3.

14 *Griffith v. Griffith*, 89 N. C. 113.

15 *Burdell v. Burdell*, 2 Barb. 473; *McIntosh v. McIntosh*, 12 How. Pr. 289; *Henry v. Henry*, 3 Robt. 614; 27 How. Pr. 5. But see *Doe v. Roe*, 23 Hun, 19; *Hughes v. Hughes*, Law R. 1 Pro. & D. 213.

16 *Allen v. Allen*, N. Y. Sup. Ct. 19 N. Y. Week. Dig. 212. And see *Klein v. Klein*, 2 Jones & S. 43; 42 How. Pr. 168; 11 Abb. Pr. N. S. 450.

17 *Ward v. Ward*, 5 Abb. Pr. N. S. 145.

18 *Allen v. Allen*, N. Y. Sup. Ct. 19 N. Y. Week. Dig. 212.

19 *Gibson v. Gibson*, 46 Wis. 449.

20 *Burns v. Burns*, 13 Fla. 369.

21 *Morris v. Morris*, 20 Ala. 163.

22 *Bennett v. Bennett*, 28 Cal. 599; *Phelan v. Phelan*, 12 Fla. 449. See *Strode v. Strode*, 3 Bush, 227.

§ 142. **Divorce—Answer.**—The several offenses which by statute constitute grounds of divorce are pleadable in bar to such suits, the one to the other, within the principle of the doctrine of recrimination.¹ Thus, in an action for divorce on the ground of adultery, an answer of adultery committed by the plaintiff is a defense, and a ground for affirmative relief in the same action.² In such action, the defendant may set up as a counter-claim both adultery and cruelty.³ Recrimination and condonation must be specially pleaded;⁴ and when in a suit for divorce, adultery is pleaded in recrimination, the acts of adultery must be designated and specified in the same manner required in a complaint or petition for divorce for adultery;⁵ and no less evidence is required to establish recriminating charges than in an original action for divorce.⁶ But the inhabitancy of either party need not be averred in the answer,⁷ as is required in a complaint.⁸ It should, however, allege that the offense of the plaintiff was

committed without the procurement, connivance, privity, or consent of the defendant.⁹ In an action for a limited divorce, on the ground of cruelty, misconduct of the plaintiff sufficient to entitle the defendant to relief is a complete defense;¹⁰ and the adultery of the plaintiff is a perfect defense in such case, if set up and established.¹¹ In an action by a wife against her husband for a separation, if he sets up a counter-claim and alleges that his wife was guilty of adultery, and such allegation was made as a foundation for a claim for a demand for affirmative relief, and not simply as a defense to the plaintiff's action, this is tantamount to the commencement of an action by him against his wife for divorce on the ground of adultery, and as to that counter-claim, she has the same right as though she were defendant in an action brought against her for an absolute divorce.¹²

1 Lesener v. Lesener, 31 Barb. 330; Conant v. Conant, 10 Cal. 249; Wilson v. Wilson, 40 Iowa, 230; McNamara v. McNamara, 9 Abb. Pr. 18; 2 Hilt. 547; Johns v. Johns, 29 Ga. 718; Clark v. Clark, 7 Robt. 276.

2 Anon. 17 Abb. Pr. 48; Leslie v. Leslie, 11 Abb. Pr. N. S. 311; Fullmer v. Fullmer, 6 N. Y. Week. Dig. 22, 42; Finn v. Finn, 62 How. Pr. 83; Bleck v. Bleck, 27 Hun, 296.

3 Spahn v. Spahn, 12 Abb. N. C. 160. And see Doe v. Roe, 23 Hun, 19. But see Terhune v. Terhune, 40 How. Pr. 258; R. F. H. v. S. H. 40 Barb. 9.

4 Morrell v. Morrell, 3 Barb. 236; Roe v. Doe, 14 Hun, 612.

5 Mitchell v. Mitchell, 61 N. Y. 398; Tim v. Tim, 47 How. Pr. 253; Reid v. Reid, 21 N. J. Eq. 331.

6 Pollock v. Pollock, 71 N. Y. 137.

7 Lesener v. Lesener, 31 Barb. 330.

8 Tim v. Tim, 47 How. Pr. 253.

9 Anon. 17 Abb. Pr. 48; Morrell v. Morrell, 3 Barb. 236. But see Young v. Young, 18 Minn. 90.

10 Palmer v. Palmer, 1 Sheld. 89.

11 Doe v. Roe, 23 Hun, 19; 11 N. Y. Week. Dig. 191.

12 De Mell v. De Mell, 67 How. Pr. 20. In a divorce suit, the answer of the defendant, who fails to pay alimony and counsel fees as ordered, may be struck out: Brisbane v. Brisbane, 67 How. Pr. 184.

‡ 143. **Executors and administrators.**—When a party sues as executor or administrator, the complaint or

petition must contain the proper allegations to show that he is entitled to sue in that capacity.¹ He should allege in a direct and issuable form that he is executor or administrator,² but no particular form of allegation is essential;³ nor is it necessary or proper for a plaintiff, who sues as executor or administrator, to make proof of letters testamentary or of administration, as was requisite under the former practice.⁴ The date, place, and court by whom letters were granted should be stated;⁵ and where a plaintiff suing as administrator alleged that he had been "duly appointed," without any fact as to whom, or how, or by whom, it was held to be insufficient.⁶ But an allegation that letters testamentary were granted and issued by the proper court is sufficient, without averring an acceptance of the trust and qualification therefor;⁷ both are implied in the grant and issuance of letters testamentary.⁸ And where the allegations of the complaint show that the plaintiff is the owner and holder of the instrument in suit, not in his own right but in his capacity as administrator, the complaint will not be held bad on demurrer, for a failure to state that the plaintiff sues in his representative capacity.⁹ So a complaint in an action by an executor, which alleges that probate of the will and qualification of the executor were had in the proper court before filing the complaint, is sufficient, and a demurrer thereto will not be sustained, upon the ground that it does not show probate and qualification before suit brought.¹⁰ In an action by an administrator to recover the value of personal property belonging to the estate and converted by the defendant, an averment in the complaint, that the estate owned and possessed the property, is equivalent to an averment that the administrator owned and possessed it.¹¹ It is held that an executor may join in the same complaint

a paragraph for trespass *quare clausum fregit* during the testator's lifetime, with another for a like trespass after his death, to lands devised to the executor in trust for specific purposes, and that this is not a misjoinder.¹² In a suit by an administrator *de bonis non*, the petition showed that the estate had, prior to his appointment, been under the charge of two administrators, and that the letters of one of them had been revoked, but it failed to show that the letters of the other had been revoked, or his administration had been otherwise brought to a close, and it was held that this omission rendered the petition fatally defective.¹³ In an action against one as executor, upon an instrument executed by him as executor, it is sufficient if the complaint alleges that fact,¹⁴ and the particulars of the defendant's appointment need not be set forth, as is required to be done where one sues as executor, or where an action is brought to recover a debt due to or from a testator.¹⁵ It is held that causes of action against an executor or administrator, in his capacity as such, cannot be joined with demands against him individually.¹⁶ An allegation in the complaint or petition, that the plaintiff is administrator, is put in issue by a general denial;¹⁷ and in an action by an administrator on a promissory note executed to the intestate, a failure to prove the plaintiff's representative capacity is held to be fatal under a general denial.¹⁸ But where the complaint alleges the death of an intestate, and the due and legal appointment of the plaintiff as administrator of the estate, and the answer contains only a general denial, the letters of administration, in due form produced in evidence, are sufficient *prima facie* to establish the plaintiff's representative capacity.¹⁹ In Wisconsin, a mere general denial does not put in issue the representative character of the plaintiff alleged in the com-

plaint, and the issue must be raised by a special denial.²⁰ So in Iowa, an averment by the plaintiff in his petition "that he is the duly appointed, qualified, and acting administrator," etc., is not put in issue by a general denial, but only by alleging the facts relied upon to show that the averment is not true.²¹ In an action against an administrator, a defense that the claim sued on was not presented for allowance before the action was brought should aver all the facts of publication, etc.,²² and such defense is waived, where the administrator joins issue and goes to trial on the validity of the claim without objection.²³ In an action brought by an administrator in his official capacity, the defendant cannot show, under the plea *ne unques administrator*, that the plaintiff's authority has ceased since the commencement of the suit, but that fact must be specially pleaded to the further maintenance of the action, or *puis darrein continuance* pleaded, according as it occurred before or after issue joined or plea pleaded.²⁴ One who has contracted with an administrator in his representative capacity cannot, when sued by him on the contract, plead *ne unques administrator*; ²⁵ the making of the contract with the administrator is an admission of his representative capacity.²⁶

1 English v. Roche, 6 Ind. 62; State v. Matson, 38 Mo. 489; Halleck v. Mixer, 16 Cal. 574. And see § 32, *ante*.

2 Rightmeyer v. Raymond, 12 Wend. 51; Sheldon v. Hoy, 11 How. Pr. 11; Bank of Lowville v. Edwards, 11 How. Pr. 216; Mohr v. Sherman, 25 Ark. 7; Fesmire v. Brook, 25 Ark. 20.

3 Bird v. Cotton, 57 Mo. 568; Headlee v. Cloud, 51 Mo. 301. See Fowler v. Westervelt, 40 Barb. 374; Gould v. Glass, 19 Barb. 179.

4 Welles v. Webster, 9 How. Pr. 251; Bright v. Currie, 10 N. Y. Leg. Obs. 104; 5 Sand. 433.

5 Dayton v. Connah, 18 How. Pr. 326; Morgan v. Lyon, 12 Wend. 265; Barfield v. Price, 40 Cal. 535; Gulick v. Gulick, 33 Barb. 92, 21 How. Pr. 22.

6 White v. Joy, 13 N. Y. 83; Beach v. King, 17 Wend. 197; Judah v. Fredericks, 57 Cal. 389.

7 Mattison v. Childs, 5 Colo. 78. And see Dial v. Tappan, 20 S. C. 167.

- 8 *Mattison v. Childs*, 5 Colo. 78.
- 9 *Dial v. Tappan*, 20 S. C. 167. Compare *Beers v. Shannon*, 73 N. Y. 232; *Fowler v. Westervelt*, 17 Abb. Pr. 60; 40 Barb. 374; *Hyde v. Supervisors etc.* 43 Wis. 129.
- 10 *Hurst v. Addington*, 84 N. C. 143.
- 11 *Ham v. Henderson*, 50 Cal. 367.
- 12 *Pittsburgh etc. R. R. Co. v. Swinney*, 97 Ind. 566.
- 13 *State v. Green*, 65 Mo. 523.
- 14 *Kingsland v. Stokes*, 61 How. Pr. 494; *Skelton v. Scott*, 18 Hun, 375.
- 15 *Kingsland v. Stokes*, 61 How. Pr. 494; 58 How. Pr. 1. And see *Yates v. Hoffman*, 5 Hun, 113.
- 16 *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munroe*, 4 Lans. 67, 47 N. Y. 360. Compare *Day v. Stone*, 15 Abb. Pr. N. S. 137; *Tradesmen's Bank v. McFeeby*, 61 Barb. 522; *French v. Salter*, 17 Hun 546; *Watson v. Dickey*, Tapp. 203; *Fish v. Berkey*, 10 Minn. 199; *Howard v. Powers*, 6 Ohio, 92.
- 17 *Gilmore v. Morris*, 13 Mo. App. 114.
- 18 *Gilmore v. Morris*, 13 Mo. App. 114; *State v. Price*, 21 Mo. 434.
- 19 *Belden v. Meeker*, 47 N. Y. 307; aff'g, 2 Lans. 470.
- 20 *Ewen v. Railroad Co* 38 Wis. 613; *Sanford v. McCreedy*, 28 Wis. 103. Compare *Denver etc. R. R. Co. v. Woodward*, 4 Colo. 1; *Lewis v. Johnston*, 67 N. C. 38; *Harte v. Houchin*, 50 Ind. 327.
- 21 *Mayes v. Turley*, 60 Iowa, 407.
- 22 *Ryan v. Flanagan*, 38 N. J. L. 161. See *Kyle v. Kyle*, 15 Ohio St. 15; *Musser v. Chase*, 29 Ohio St. 577; *Worthley v. Hammond*, 13 Bush, 510.
- 23 *Pepper v. Sidwell*, 36 Ohio St. 454.
- 24 *Burns v. Hindman*, 7 Ala. 531; *McDongald v. Rutherford*, 30 Ala. 253; *Wilson v. Bothwell*, 50 Ala. 373.
- 25 *Hill v. Huckabee*, 52 Ala. 155.
- 26 *Riddle v. Hill*, 51 Ala. 224. In an action by an administrator upon a promissory note due the estate of the intestate, the authority of the administrator cannot be attacked by the defendant on the ground that his appointment was irregularly made. Having no interest in the estate, it is a matter of no importance to the defendant, if he would be protected from a second payment of the same sum: *Glendenning v. McNutt*, 1 Idaho, 502. And see *Emery v. Hildreth*, 2 Gray, 223.

§ 144. Foreclosure — Complaint. — In an action to foreclose a mortgage, the mortgage and the note or bond secured thereby must in some way be made a part of the complaint or petition;¹ though, if the mortgage be set out in substance, it is sufficient.² And alleging that the defendant executed the instrument, setting it out in full, is equivalent to alleging that he made all the covenants and promises contained in such

instrument, and assumed all the liabilities created thereby.³ An allegation that "the defendant gave a mortgage" is simply a conclusion of law, and the mortgage not having been set out in the complaint is insufficient to authorize a decree for sale upon default.⁴ But the defect arising upon the failure to exhibit copies of a note and mortgage by a complaint to foreclose is one which is cured by the finding of the court or the verdict of a jury.⁵ Record of the mortgage need not be averred in a suit to foreclose against the original mortgagor,⁶ nor when the defendant is a subsequent purchaser of the mortgaged premises, who is alleged in the complaint to have assumed the payment of the mortgage debt as part of the purchase money.⁷ An allegation in the complaint that a party who is made a co-defendant with the mortgagor has, or claims to have, some interest in or claim upon the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, sufficiently states a cause of action, without averring the character of the interest.⁸ But if there are infant defendants, the complaint should allege the requisite facts to show what are the interests of the infants.⁹ A mere averment in a complaint to foreclose against a person other than the mortgagor, that "he is now the owner of the land," is not sufficient to show that the mortgage constitutes a lien upon the land as against him, since he may have acquired the land before the mortgage was executed.¹⁰ The complaint must show that the debt secured by the mortgage is due and owing to the complainant;¹¹ and where the complaint alleges the giving of a bond, there must be an allegation of default in the performance of the condition of the bond.¹² An averment that the note and mortgage were duly assigned to the plaintiff is sufficient, without setting out a copy of the assignment,¹³

under such averment the plaintiff may prove an indorsement and delivery of the note.¹⁴ An allegation in the complaint that no proceedings have been had at law for the recovery of the debt secured by the mortgage is sufficient to show that no action at law has been commenced.¹⁵ Where the debt secured by the mortgage is payable on demand, demand before suit to foreclose need not be shown.¹⁶ A complaint in an action against an administrator to enforce the lien of a mortgage need not aver that notice to creditors has been published, but must aver the presentation of the mortgage claim for allowance.¹⁷ A complaint in foreclosure must ask for a judgment for the deficiency, if any shall exist, against a purchaser, or assignor, or guarantor of the mortgage, who may be liable for the debt, in order to authorize the court to render such judgment, where such defendants have not answered.¹⁸ In an action to redeem lands sold under foreclosure, the plaintiff must allege that he was not made a party defendant in the foreclosure suit.¹⁹ The complaint in an action to foreclose a chattel mortgage is not bad for want of an averment that, at the time the mortgage was executed, the chattels mortgaged were the property of the mortgagor.²⁰ A complaint for the foreclosure of a mechanic's lien is fatally defective, which fails to state that something was due for the services on which the lien was founded at the time the action was begun.²¹ But although the complaint itself does not state that the debt is due, yet if that fact is stated in the petition which is embodied in and made a part of the complaint, it is sufficient.²²

1 See *Shoaf v. Joray*, 86 Ind. 70, *Buck v. Art*, 85 Ind. 512; *Hlatt v. Goblt*, 18 Ind. 494; *Boone Mort.* § 180. As to description of property: See *Crosby v. Dowd*, 61 Cal. 557, 602.

2 *Sturgeon v. Board of Commissioners*, 65 Ind. 302; *Cecil v. Dynes*, 2 Ind. 266.

3 *Budd v. Kramer*, 14 Kan. 101.

- 4 *Hussey v. Hussey*, 1 Utah, 241.
- 5 *Martin v. Holland*, 87 Ind. 105. And see *Galvin v. Woollen*, 86 Ind. 464.
- 6 *Snyder v. Bunnell*, 64 Ind. 403; *St. Mark's Ins. Co. v. Harris*, 13 How. Pr. 95. See *Martens v. Rawdon*, 73 Ind. 85.
- 7 *Searry v. Eldridge*, 63 Ind. 44. See *Boone Mort.* § 180.
- 8 *Anthony v. Nye*, 30 Cal. 401; *Poett v. Stearns*, 28 Cal. 226; *Drury v. Clark*, 16 How. Pr. 424; *Rice v. Hall*, 41 Wis. 453; *Frost v. Koon*, 30 N. Y. 448; *Case v. Bartholow*, 21 Kan. 300; *Nooner v. Short*, 20 Kan. 624; *Seager v. Burns*, 4 Minn. 141; *Bowen v. Wood*, 35 Ind. 283; *Marot v. Germania etc. Assoc.* 54 Ind. 37; *Woodworth v. Zimmerman*, 92 Ind. 349.
- 9 *Aldrich v. Lapham*, 1 Code R. N. S. 408; 6 How. Pr. 129.
- 10 *Nichol v. Henry*, 89 Ind. 54.
- 11 *Cornellius v. Halsey*, 11 N. J. Eq. 27.
- 12 *Coulter v. Bower* 64 How. Pr. 132.
- 13 *Green v. Marble*, 37 Iowa, 95; *Barthol v. Blakin*, 34 Iowa, 452; *Andrews v. McDaniel*, 63 N. C. 335. And see *Kurtz v. Sponable*, 6 Kan. 395; *Allen v. First Nat. Bank*, 23 Ohio St. 97; *Nichol v. Henry*, 89 Ind. 54.
- 14 *Mundy v. Whittemore*, 15 Neb. 647.
- 15 *Mundy v. Whittemore*, 15 Neb. 647.
- 16 *Gillett v. Balcom*, 6 Barb. 361; *Insurance Co. v. Curtis*, 35 Ohio St. 357. Compare *Insurance Co. v. Curtis*, 35 Ohio St. 343; *Belmont County Branch Bank v. Price*, 8 Ohio St. 299; *Harris v. Mulock*, 9 How. Pr. 402.
- 17 *Harp v. Callahan*, 46 Cal. 222. See *Kingsland v. Stokes*, 25 Hun, 107; 58 How. Pr. 1, *Skelton v. Scott*, 18 Hun, 375.
- 18 *Simonson v. Blake*, 12 Abb. Pr. 331; 20 How. Pr. 484. See *Manhattan Life Ins. Co. v. Glover*, 14 Hun, 133; *Olinger v. Liddle*, 55 Wis. 621; *Boone Mort.* § 203.
- 19 *Carpentier v. Brenham*, 50 Cal. 549; *Dervin v. Jennings*, 4 Neb. 97.
- 20 *Edwards v. Trittipo*, 62 Ind. 121. See *Boone Mort.* § 275.
- 21 *Stubbs v. Railroad Co.* 63 Iowa, 280. And see *Roberts v. Campbell*, 59 Iowa, 675.
- 22 *Huse v. Washburn*, 59 Wis. 414.

§ 145. **Foreclosure—Answer.**—An answer in an action to foreclose a mortgage, which admits the making of the mortgage as security for a debt, admits the cause of action, and a denial of the remaining allegations is aimed at a mere legal conclusion, and puts nothing in issue.¹ An answer that the mortgage is of no binding effect, and no lien upon the premises described in the complaint, is a statement of a conclusion unsupported by facts, and is unavailing.² It is no defense in such

action that the mortgagor had no title to the premises mortgaged;³ nor in such action can the mortgagor set up as a defense a defect in his title.⁴ But an answer setting up title in a third person named is not frivolous, but shows a good defense,⁵ otherwise of an allegation of a conspiracy to prevent the defendant from raising money to pay the mortgage, and that the assignment to the plaintiff was made from malicious motives, and to enable an action to be brought.⁶ As a general rule, there must be an eviction of the mortgagor before he can be relieved from the mortgage, on the ground of a failure of the consideration of the mortgage, or of the title conveyed by the mortgagee.⁷ And where in an action to foreclose a purchase-money mortgage the defendant set up in his answer, and on the trial in effect offered to prove false and fraudulent misrepresentations as to the boundary and quantity of land sold, a partial failure of title and an offer to rescind, but did not offer to prove eviction, it was held that the evidence was rightly excluded.⁸ A mortgagor may set up in his answer and prove a mistake in the drawing of the mortgage, and claim a reformation of the instrument.⁹ So he may plead that the plaintiff procured the assignment of the mortgage by fraud, and that the debt has been paid to the mortgagee and a release received.¹⁰ In an action to foreclose a mortgage which imports a consideration, the want of consideration is an affirmative defense, which must be set up in the answer unless the want of consideration clearly appears upon the face of the complaint.¹¹ A mortgage not being a negotiable instrument, is held to be subject to the defenses existing between the original parties.¹²

1 *Kay v. Churchill*, 10 Abb. N. C. 83. And see *Fosdick v. Graff*, 22 How. Pr. 158; *Cooley v. Hobart*, 8 Iowa, 358. As to what constitute defenses to a foreclosure suit: See *Boone Mort.* § 181.

2 *Caryl v. Williams*, 7 Lana. 416.

3 *Board of Trustees v. Shulze*, 61 Ind. 511. And see *Axtel v. Chase*, 83 Ind. 546; *Blanchard v. Jamison*, 14 Neb. 244.

4 *Dime Sav. Bank v. Crook*, 29 Hun, 671.

5 *Fougera v. Molssen*, 16 Hun, 237.

6 *Morris v. Tuthill*, 72 N. Y. 575.

7 *Curtiss v. Bush*, 39 Barb. 661. Compare *Conwell v. Clifford*, 45 Ind. 392; *Booth v. Ryan*, 31 Wls. 45; *Robards v. Cooper*, 16 Ark. 288; *Dunning v. Leavitt*, 85 N. Y. 80.

8 *Alden v. Pryal*, 60 Cal. 215.

9 *Andrews v. Gillespie*, 47 N. Y. 437.

10 *Hall v. Erwin*, 57 N. Y. 643. See further as to setting up the defense of fraud: *McGuskin v. Kline*, 31 N. J. Eq. 454; *Dayton v. Melick*, 27 N. J. Eq. 382; *Lyke v. Post*, 65 How. Pr. 298; *Reagan v. Hadley*, 57 Ind. 509.

11 *Bolling v. Munchus*, 65 Ala. 558.

12 *Ingraham v. Disborough*, 47 N. Y. 421. And see *Colehour v. State Sav. Inst.* 90 Ill. 152. An answer to a complaint to foreclose a mortgage, showing a contemporaneous written contract of the parties to the effect that the debt should be payable only upon the occurrence of an event which never happened, is good on demurrer: *Lucas v. Hendrix*, 92 Ind. 54. Where the proof in an action to foreclose a mortgage clearly shows that the mortgage was usurious, a plea of tender of a certain amount in the answer cannot be held to constitute a conclusive admission that such an amount is due, the answer also setting up the usury as a defense: *Breunich v. Weselmann*, 17 Jones & S. 31.

§ 146. **Forcible entry and detainer.**—Forcible entry and detainer being a statutory proceeding, and the authority to proceed being derived from the statute, a strict compliance therewith is required;¹ though this objection may be waived by omitting to make it in proper time.² In a complaint for forcible entry and detainer, the property should be particularly described, for the possession of which the action is brought,³ and the mode in which the defendant unlawfully got possession should be specified.⁴ A description of the land sufficiently definite to enable the administration of substantial justice is all that is required in actions before justices of the peace;⁵ and if the complaint avers that the lands are in the county where the suit is brought, a failure to mention the State will not be a fatal defect.⁶ It is an essential averment in the complaint, that at the time of the alleged forcible entry, the plaintiff was in

the actual possession of the premises, and he must prove this averment on the trial.⁷ So a complaint which merely charged that the defendant entered upon the premises in controversy "with force and violence," and that he had "with force detained the same," was held to be fatally defective in omitting to charge that such entry and detention were *unlawful*.⁸ If the complaint charges a forcible entry with a multitude of people, and a forcible and unlawful detainer, the forcible entry is the gist of the action.⁹ Where the complaint avers that the defendant unlawfully entered upon the demanded premises, and the answer denies that he entered unlawfully, it admits the entry and raises an issue only upon the question of its lawfulness.¹⁰ In an action of forcible entry and detainer before a justice of the peace, if the petition does not set up title in the plaintiff, an answer denying the plaintiff's title and averring title in the defendant is not responsive to the petition, and does not raise an issue involving the title to the property which requires the removal of the action to the Circuit Court.¹¹

¹ *People v. Field*, 53 Barb. 270. And see *Wood v. Phillips*, 43 N. Y. 152. But see *Silvey v. Sumner*, 61 Mo 253; *Canavan v. Gray*, 64 Cal. 5.

² *People v. Field*, 53 Barb. 270. And see *Grant v. Marshall*, 12 Neb. 483; *Jarvis v. Hamilton*, 16 Wis. 574.

³ *Grant v. Marshall*, 12 Neb. 483; *Sanchez v. Luna*, 1 New Mexico, 238.

⁴ *Sanchez v. Luna*, 1 New Mexico, 238.

⁵ *Hernandez v. Simon*, 4 Cal. 182.

⁶ *More v. Del Valle*, 28 Cal. 170. And see *Boxley v. Collins*, 4 Blackf. 320.

⁷ *Cummins v. Scott*, 23 Cal. 526. Compare *Baker v. Dixon*, 62 Cal. 19; *Minturn v. Burr*, 16 Cal. 107; *More v. Del Valle*, 28 Cal. 170. A complaint in an action under the Minnesota statute (Gen. Stats. 1878, ch. 84, § 11) need not state that the plaintiff is the owner, or that he is entitled to the possession of the demised premises, if it shows a leasing by him to the defendant, and an entry and possession by the latter under such leasing: *Engels v. Mitchell*, 30 Minn. 122.

⁸ *Blaco v. Haller*, 9 Neb. 149.

⁹ *McMinn v. Bliss*, 31 Cal. 122. See *Thompson v. Smith*, 28 Cal. 332; *Preston v. Kehoe*, 15 Cal. 315.

10 *Leroux v. Murdock*, 51 Cal. 541. In an action by a landlord against a tenant for unlawful detainer, the defendant set up a counterclaim for damages resulting from the dilapidated condition of the leased premises, and it was held that a demurrer to the counterclaim was properly sustained: *Van Every v. Ogg*, 59 Cal. 563. And see *Kelly v. Teague*, 63 Cal. 63.

11 *Jordon v. Walker*, 56 Iowa, 696. No question of title is in general admissible in an action of forcible entry and detainer. It merely devolves upon the plaintiff to show that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained the same: See *Mitchell v. Davis*, 23 Cal. 381; *Georges v. Hufschmidt*, 44 Mo. 179; *Pinney v. Fridley*, 9 Minn. 34; *Hunt v. Wilson*, 14 Mon. B. 36. The denial in such action, that the plaintiff owned the buildings on the premises in controversy, does not raise an issue which can be tried in that action: *Warburton v. Doble*, 38 Cal. 619. In California, where the owner of real property having the right to possession makes a forcible entry, the person in the wrongful possession cannot maintain an action of trespass, the remedy provided by statute for a forcible entry being exclusive; *Canavan v. Gray*, 64 Cal. 5.

§ 147. **Fraud—Complaint.**—It is a well-established general rule, that in pleading fraud the facts constituting the fraud must be specifically set forth.¹ Epithet will not answer the place of fact,² and a mere allegation that the acts complained of were fraudulently done is not sufficient.³ Fraud is found only when the facts make it apparent.⁴ The plaintiff is not, however, required to allege in detail all the minute facts constituting the alleged fraud;⁵ the ultimate fact and not the evidence should be pleaded.⁶ So the rule that fraud must be directly alleged in the pleading is held not to apply to a case agreed where all the facts are stated, and the matters of law or legal inference are left to the court.⁷ And it is held, that a fraud claimed to have been committed in one of two different ways may be alleged in the alternative as having been committed in one or the other of the ways named, where it is unknown to the party pleading in which of the ways the fraud was committed, and where, in either event, the facts pleaded would constitute a fraud.⁸ In pleading fraud, the complaint must show not only what the fraud was by which the plaintiff has been injured, but also its connection with the alleged damage, so that it may appear judicially

to the court that the fraud and the damage sustain to each other the relation of cause and effect, or, at least, that the one might have resulted directly from the other.⁹

1 *Hardy v. Brier*, 91 Ind. 91; *Clark v. Dayton*, 6 Neb. 192; *Clodfelter v. Hulett*, 72 Ind. 137; *Fry v. Day*, 97 Ind. 348; *Williams v. First Presbyterian Soc.* 1 Ohio St. 478.

2 *Hardy v. Brier*, 91 Ind. 91.

3 *McGindley v. Newton*, 75 Mo. 115; *Smith v. Sims*, 77 Mo. 269; *Capuro v. Builders' Ins. Co.* 39 Cal. 123; *Lawrence v. Foxwell*, 17 Jones & S. 273.

4 *Rasmussen v. McKnight*, 3 Utah, 315.

5 *Rasmussen v. McKnight*, 3 Utah, 315; *Cowen v. Toole*, 31 Iowa, 513; *Cummings v. Thompson*, 18 Minn. 246; *Fox v. Webster*, 46 Mo. 181.

6 *Cowen v. Toole*, 31 Iowa, 513; *Singleton v. Scott*, 11 Iowa, 389.

7 *McRae v. Battle*, 69 N. C. 98.

8 *Rasmussen v. McKnight*, 3 Utah, 315.

9 *Byard v. Holmes*, 34 N. J. L. 296. And see *Bish v. Van Cannon*, 94 Ind. 263; *Bremond v. McLean*, 45 Tex. 10. In a suit by husband and wife for fraud upon the wife, affecting her separate property, it is not necessary to aver that the husband was deceived: *Roller v. Blair*, 96 Ind. 208.

§ 148. **Fraud—Answer.**—Fraud must be specially pleaded in an answer as well as in a complaint.¹ The circumstances constituting fraud must be set up.² Thus, an answer seeking to avoid a contract, by reason of fraudulent representations of the plaintiff in procuring it, must state in what the representations consisted, and they must be of matter of fact of which the defendant was ignorant, and not of law.³ So it must be alleged that the defendant was misled, or that his belief in the truth of the false representations, or other fraud, induced him to enter into the contract,⁴ and that the false representations were made with intent to defraud.⁵ In an action on a note, an answer that it was obtained by fraud, not stating facts, is held to be frivolous.⁶ Where the petition, in an action against the principal for a fraud committed by his agent, properly states the cause of action, and avers that the fraud was not discov-

ered until within four years before the suit was begun, an answer charging that the cause of action did not accrue within four years before suit, *because* the fraud was not committed within said time, is held to be insufficient.¹ So if an answer contains only a general allegation of fraud, and the trial of the issue of fraud thus presented proceeds to its conclusion without objection by the plaintiff as to its sufficiency, or objection to evidence, on that ground, offered by the defendant in support of the issue of fraud, under these circumstances an objection to the answer, that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, comes too late, and will not be considered on appeal.²

1 Tucker v. Parks, 7 Colo. 82.

2 Gifford v. Carvill, 29 Cal. 589; People v. San Francisco, 27 Cal. 656; First Nat. Bank v. How, 1 Mont. 604; Wilder v. De Cou, 18 Minn. 470.

3 People v. San Francisco, 27 Cal. 656.

4 Saxton v. Dodge, 57 Barb. 84; Van De Sande v. Hall, 13 How. Pr. 458; Simmons v. Kayser, 11 Jones & S. 131.

5 Stafford Pavement Co. v. Monheimer, 9 Jones & S. 184; Dubois v. Hermance, 56 N. Y. 673; Letter v. Field, 52 N. Y. 621; Hilsen v. Libby, 12 Jones & S. 12.

6 McMurray v. Gifford, 5 How. Pr. 14. See Shook v. Singer Manuf. Co. 61 Ind. 520.

7 Maple v. Railroad Co. 40 Ohio St. 313.

8 King v. Davis, 34 Cal. 100.

§ 149. **Fraudulent conveyances.**—In an action to set aside a conveyance of land upon the ground of fraud, the complaint must aver the delivery of the deed claimed to be fraudulent.¹ In stating a cause of action for relief against conveyances in fraud of creditors, it is necessary to allege that the conveyance was made with the intent either to hinder, delay, or to defraud the plaintiff.² So a conveyance cannot be impeached for fraud as against creditors, if the debtor retains ample property in his own name, subject to execution, to

satisfy all his debts;³ therefore, in a suit by creditors to set aside a conveyance as fraudulent, an averment that there is no other property out of which to make the claim by execution is generally held to be necessary.⁴ It is enough, however, to allege that at the date of the conveyance the debtor did not have enough property left, subject to execution, to pay all his debts, and the complaint need not aver that he had no property subject to execution when the suit was begun.⁵ So it is held to be sufficient in a complaint in a suit by a judgment creditor to reach property alleged to have been conveyed in fraud of his rights, to state that an execution had been issued upon his judgment, and "duly returned unsatisfied," without alleging the debtor's insolvency, or that he had no other property out of which the judgment could be made.⁶ If the complaint or petition shows on its face that the conveyance was made more than four years (the period of limitation) before the action was brought, it must contain an averment that the fraud was not discovered until within that period;⁷ otherwise, the defendant may demur on the ground that it does not state facts sufficient to constitute a cause of action.⁸ Under the practice in most of the States, the creditor must first have reduced his claim to a judgment, and this should be averred;⁹ but in Ohio, this is not required.¹⁰ In ejectment to recover a town lot, the defendant answered alleging that he voluntarily executed and delivered the deed, upon which the plaintiff relies, without consideration, for the sole purpose of hindering, delaying, and defrauding his creditors; that the plaintiff accepted the deed with full knowledge of the facts, and agreed, upon demand and without consideration, to reconvey the property to the defendant; that the defendant did not surrender the possession, and that the plaintiff has

never been in the possession thereof; and it was held that the averments in the answer, setting up the fraud, did not constitute any defense to the action, and that the plaintiff's demurrer to the answer was properly sustained.¹¹

1 Doerfler v. Schmidt, 64 Cal. 235.

2 Morgan v. Bogue, 7 Neb. 423. And see Newman v. Cordell, 43 Barb. 448; Evans v. Lewis, 30 Ohio St. 11.

3 Hogan v. Robinson, 94 Ind. 138; Pennington v. Flock, 93 Ind. 378; Emery v. Yount, 7 Colo. 107.

4 Price v. Sanders, 60 Ind. 310; Whitesel v. Hiney, 62 Ind. 168; Emery v. Yount, 7 Colo. 107; Moore v. Lampton, 80 Ind. 301; Noble v. Hines, 72 Ind. 12. But this is not required in Ohio: Gormley v. Potter, 29 Ohio St. 597; Westerman v. Westerman, 25 Ohio St. 500. And see Rounds v. Green, 29 Minn. 139.

5 Jennings v. Howard, 80 Ind. 214. See McPherson v. Kingsbaker, 22 Kan. 646.

6 Page v. Grant, 9 Oreg. 116. See Loving v. Pairo, 10 Iowa, 232.

7 Combs v. Watson, 2 Cin. Rep. 523; 32 Ohio St. 223. And see Gates v. Andrews, 37 N. Y. 657.

8 Combs v. Watson, 2 Cin. Rep. 523; 32 Ohio St. 223.

9 Gorton v. Massey, 12 Minn. 145; Rounds v. Green, 29 Minn. 139; McCartney v. Bostwick, 31 Barb. 390; Phelps v. Jackson, 27 Ark. 585; Kent v. Curtis, 4 Mo. App. 121.

10 Combs v. Watson, 2 Cin. Rep. 523; 32 Ohio St. 223.

11 Peterson v. Brown, 17 Nev. 172. A conveyance by a debtor of his homestead is not fraudulent as to creditors: Pike v. Miles, 23 Wis. 161; and in an action to set aside such conveyance, the fact that the property was the debtor's homestead may be shown under a general denial: Hibben v. Soyer, 33 Wis. 319. And the defense is available to the grantee without having been set up by the debtor himself: Hibben v. Soyer, 33 Wis. 319. In a suit to set aside a fraudulent conveyance, the defendants cannot set up as a defense fraud upon creditors who are strangers to the record: Steadman v. Hayes, 80 Mo. 319.

§ 150. **Goods sold and delivered.**—In a complaint for goods sold and delivered, the ordinary form of a count in *indebitatus assumpsit* is sufficient under the Code system of pleading.¹ Thus, a complaint for goods sold, which avers that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that the defendant has not paid for the same, states a good cause of action.² The promise to pay, alleged in the common count in *assumpsit*, was

a mere conclusion of law from the facts stated, and need not be averred under Code pleading, which requires only the facts to be stated.³ But a complaint which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or in what manner the indebtedness accrued, whether on account of the defendant, or that of another, is insufficient.⁴ If the complaint *in hæc verba* sets forth the bill of sale, this will remedy a defect in the description of the quantity of the goods sold.⁵ It is not necessary to allege that the demand has not been paid, or that it remains due and unpaid at the time of commencing the action;⁶ payment is an affirmative defense, and should be alleged and proved by the defendant.⁷ An allegation that the defendant consented, agreed, and promised to buy is not sufficient as an allegation of a sale, or of an agreement for a sale.⁸ In an action to recover for goods sold and delivered, the defendant may deny each and every allegation in the complaint contained on information and belief.⁹ But a denial in form, "any information sufficient to form a belief as to the allegations of the complaint," is held to be insufficient, and in such case the allegations of the complaint must be taken as true, and averments in the answer that the goods were bought by the defendant of a stranger, who had been paid therefor, do not constitute a defense, although they might have if the denial had been in proper form, namely, "any knowledge or information sufficient," etc.¹⁰ If the complaint avers the sale and delivery to the defendant of goods and their value, an answer which denies the indebtedness but does not deny the facts, the sale and delivery, and amount of goods, does not raise an issue, as it only denies the legal conclusion resulting from the facts.¹¹

1 *Allen v. Patterson*, 7 N. Y. 476; *Magee v. Cast*, 49 Cal. 141; *Curran v. Curran*, 40 Ind. 473; *Meagher v. Morgan*, 3 Kan. 372; *Freeborn v. Glazer*, 10 Cal. 337.

2 *Abadie v. Carrillo*, 32 Cal. 172; *Kerstetter v. Raymond*, 10 Ind. 199; *Magee v. Kast*, 49 Cal. 141.

3 *Wilkins v. Stedger*, 22 Cal. 232; *Farron v. Sherwood*, 17 N. Y. 230; *Higgins v. Germaine*, 1 Mont. 230; *Levinson v. Swartz*, 22 Cal. 229.

4 *Mershon v. Randall*, 4 Cal. 324. And see *Buell v. Cory*, 50 Cal. 639, 641; *Keller v. Struck*, 31 Minn. 446. A complaint for certain cattle sold and delivered is not sustained by evidence that such cattle were delivered to the defendant to be slaughtered and the meat sold on commission: *Evans v. Bailey*, Sup. Ct. Cal. 4 West C. Rep. 427.

5 *Cochran v. Goodman*, 3 Cal. 244.

6 *Salisbury v. Stinson*, 10 Hun, 242. And see *Smith v. Holmes*, 19 N. Y. 271. That it is better to allege non-payment: See *Roberts v. Treadwell*, 50 Cal. 520; *Downey v. Whittenberger*, 60 Ind. 188; *Wilkins v. Moore*, 20 Kan. 538.

7 *Salisbury v. Stinson*, 10 Hun, 242.

8 *Buell v. Cory*, 50 Cal. 639, 641.

9 *Richards v. Fuechsel*, 5 Civ. Proc. R. 430. And see *Henderson v. Manning*, 5 Civ. Proc. R. 221.

10 *Hautemann v. Gray*, 5 Civ. Proc. R. 224, n.

11 *Lightner v. Menzell*, 35 Cal. 452. And see *Drake v. Cockroft*, 1 Abb. Pr. 203; 10 How. Pr. 377; *Wells v. McPike*, 21 Cal. 215; *California etc. Tel. Co. v. Patterson*, 1 Nev. 151.

§ 151. **Guaranty.**—In an action upon a contract to guaranty the payment or collection of a debt contracted by another, it is not necessary to aver in the complaint that the promise was made in writing;¹ it will be presumed to have been so made until the contrary appears by the answer or proof.² And a parol guaranty of the payment or collection of a note or bill, transferred in payment for property purchased or debt due by the guarantor, is not within the statute of frauds.³ When notice of the acceptance of an offer to guaranty is requisite, the allegation of notice in the complaint in an action on such guaranty should be special, and such as will enable the court to determine from its statements whether or not the notice was given as the law requires;⁴ the general averment, "of all which the defendant had notice," is not sufficient.⁵ In an action on a contract of guaranty of prompt payment, the complaint must allege that the defendant has not paid the

indebtedness for the recovery of which the action is brought, and an allegation that the whole thereof is now due is insufficient.⁶ In an action upon a conditional guaranty, the plaintiff must establish that the condition has happened which made the defendant liable.⁷ In an action against an indorser of a promissory note, an allegation in the complaint that the plaintiff used due diligence in the prosecution of a suit against the maker will not admit of evidence that such suit would have been unavailing because of the insolvency of the maker.⁸

1 Wakefield v. Greenhood, 29 Cal. 597; Walsh v. Kattenburgh, 8 Minn. 127; Taylor v. Patterson, 5 Oreg. 121; Brannan v. Ford, 46 Cal. 7; First Nat. Bank v. Kinner, 1 Utah, 100.

2 Wentworth v. Wentworth, 2 Minn. 277; Walsh v. Kattenburgh, 8 Minn. 127.

3 Lossee v. Williams, 6 Lans. 223; Cardell v. McNeill, 21 N. Y. 336.

4 Steadman v. Guthrie, 4 Met. (Ky.) 147. See as to notice of acceptance: Taylor v. Wetmore, 10 Ohio, 490; Powers v. Bumcratz, 12 Ohio St. 273; Cal. Civ. Code, § 2795.

5 Steadman v. Guthrie, 4 Met. (Ky.) 147.

6 Roberts v. Treadwell, 50 Cal. 520.

7 Cereghino v. Hammer, 60 Cal. 235.

8 Woolsey v. Williams, 34 Iowa, 413. See Craig v. Parks, 40 N. Y. 181.

‡ 152. **Husband and wife.**—Under the statutes regulating the rights of married women which have been enacted in the several States, a wife may sue and be sued in all matters relating to her separate estate in the same manner as a *femme sole*.¹ And it is further provided in New York, that it is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property.² But generally the statute is permissive, and she may or may not sue alone at her election;³ and the husband may unite with his wife in a suit concerning her separate property, and no averment of his interest other than the marital relation is necessary in the complaint.⁴ Since the fact of coverture has ceased to have any rela-

tion to the technical right of a married woman to maintain an action in respect to her separate property, the allegation of coverture in the complaint is no longer necessary.⁵ Under a statute giving to a married woman, as though she were sole, the right to maintain an action for any injury to her person or character, and taking from the husband all right to or control over such action, and all right to or interest in any judgment recovered therein, a cause of action for an injury to the person or character of a married woman cannot be united in the same complaint with a cause of action for the husband's loss of services and expenses in consequence of such injury, although the action is brought in the name of both husband and wife.⁶ An allegation in a complaint, that a note and mortgage are the property of the wife "in her sole right and possession," sufficiently states that the same are the separate property of the wife.⁷ Where a married woman has given a promissory note, it is held that the plaintiff may declare upon it generally;⁸ the complaint need not allege that the debt was for her separate estate, nor demand a judgment to charge such estate.⁹ If she defends, she must not only plead coverture, but that the note was not given in any business she carried on.¹⁰ But it was held that where a complaint upon a bond shows it to be the obligation of a married woman, it is essential to allege that it was given for some purpose, which would make it binding upon her;¹¹ it is, *prima facie*, a nullity, and without such averments the complaint does not state a cause of action.¹² A complaint in an action upon the contract of a married woman, which alleges that certain personal property sold was for the use and benefit and at the special request of the wife, and was used in and about her premises, sufficiently alleges that the contract was in reference to her

separate property.¹³ A complaint in an action to recover a debt from a married woman, which charges that she is a sole trader under the statute, is sufficient, without any averment of facts showing that the debt was contracted in the particular business which she had declared her intention to carry on.¹⁴ In an action against the husband for goods furnished to the wife, the complaint must allege that the goods were sold and delivered to the husband.¹⁵ If a married woman sues alone, and her disability does not appear upon the face of the complaint, the defendant should set up the coverture in his answer, if he intends to avail himself of it as a defense;¹⁶ and if he merely denies each and every allegation in the complaint, he waives whatever advantage he might have had by pleading the coverture.¹⁷

1 See Cal. Code Civ. Proc. § 370; Ohio Rev. Stats. § 4996; Cumming's App. 11 Pa. St. 275; *Sheldie v. Welshlee*, 16 Pa. St. 134; *Fitzsimons v. Harrington*, 1 Civ. Proc. R. 360; *Brelman v. Paasch*, 7 Abb. N. C. 249; *Emerson v. Clayton*, 32 Ill. 493; *Beavers v. Baucum*, 33 Ark. 722.

2 N. Y. Code Civ. Proc. § 450. And see *Ackley v. Tarbox*, 31 N. Y. 564; *Draper v. Stouvenel*, 35 N. Y. 507; *Rawson v. R. R. Co.* 2 Abb. Pr. N. S. 220; *Fitzgerald v. Quann*, 62 How. Pr. 331.

3 See *Van Maren v. Johnson*, 15 Cal. 310; *Corcoran v. Doll*, 32 Cal. 82; *Kennedy v. Williams*, 11 Minn. 314; *Gillen v. Kimball*, 34 Ohio St. 352; *Gee v. Lewis*, 20 Ind. 149.

4 *Roller v. Blair*, 96 Ind. 203.

5 *Peters v. Fowler*, 41 Barb. 467.

6 *Shanahan v. City of Madison*, 57 Wis. 276. And see *Schiffer v. Eau Claire*, 51 Wis. 392; *Pier v. Fond du Lac*, 53 Wis. 432; *Ackley v. Tarbox*, 31 N. Y. 564.

7 *Kennedy v. Williams*, 11 Minn. 314.

8 *Ferris v. Holmes*, 8 Daly, 217. And see *Patton v. Kinsman*, 17 Iowa, 423; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Avery v. Vansickle*, 35 Ohio St. 270; *Deering v. Boyle*, 8 Kan. 525; *Harris v. Wilson*, 40 Ohio St. 300.

9 *Smith v. Dunning*, 61 N. Y. 249; *Hier v. Staples*, 51 N. Y. 136; *Freckling v. Rolland*, 53 N. Y. 422; *Brand v. Hammond*, 65 How. Pr. 264. But see *Jenz v. Gugel*, 28 Ohio St. 527; *Stillwell v. Adams*, 29 Ark. 346.

10 *Ferris v. Holmes*, 8 Daly, 217; *Brand v. Hammond*, 65 How. Pr. 264; *Smith v. Dunning*, 61 N. Y. 249. And see *White v. Adams*, 52 Cal. 435; *Downing v. O'Brien*, 67 Barb. 582; *Caldwell v. Brown*, 43 Tex. 210.

- 11 Broome v. Taylor, 76 N. Y. 564.
- 12 Broome v. Taylor, 76 N. Y. 564.
- 13 Musser v. Hobart, 14 Iowa, 248. See Coster v. Isaacs, 16 Abb. Pr. 328.
- 14 Melcher v. Kuhland, 22 Cal. 522. See Goulding v. Davidson, 28 N. Y. 604.
- 15 Jacobs v. Scott, 53 Cal. 74.
- 16 Dillaye v. Parks, 31 Barb. 132.
- 17 Dillaye v. Parks, 31 Barb. 132. And see Caldwell v. Brown, 43 Tex. 216; Work v. Cowhick, 81 Ill. 317. A note executed to a *femme sole* who marries before its maturity, and, qualifying as administratrix after her marriage, inventoried the note as assets of the estate of a former husband, is subject to the law of limitation, which cannot be defeated by setting up coverture: Taylor v. Bland, 60 Tex. 29.

§ 153. **Injunction.**—To warrant the court in granting an injunction, it must appear from the facts stated in the complaint that the plaintiff will suffer irreparable injury unless the defendant be enjoined.¹ A mere allegation that the plaintiff will be irreparably injured is a conclusion of law, and insufficient.² It is not, however, necessary that the complaint should set forth all the minute circumstances which may be proved to establish its general allegations.³ Where the injury complained of is one arising from the right of property in the soil, such as continued trespasses, amounting to a nuisance, or threatened irreparable injury, the plaintiff should set up his title in terms clearly showing his ownership.⁴ But if he alleges himself to be the owner of the premises in fee simple by purchase, and to be in possession, it is sufficient.⁵ In a suit to enjoin a city from using a strip of ground as a street, the complaint must not only show that there has been no grant or condemnation of the land for a street, but also that there has been no implied dedication.⁶ Injunction will not lie to prevent the wrongful collection of tolls by a turn-pike company, which merely demands the tolls without hindering the passage of those who do not pay;⁷ and a complaint to enjoin such company from collecting tolls, which does not aver that the plaintiff was hindered

from passing unless tolls were paid, is bad on demurrer.⁸ So a complaint to enjoin the prosecution of a pending suit against the plaintiff, which is based on facts which, if true, constitute a good defense to that suit, is bad on demurrer.⁹ To restrain the collection of taxes, exactness and particularity must be observed in stating the grounds for the equitable relief sought, and the injunction should not be granted when, from the averments in the complaint or petition, it remains doubtful whether all the taxes sought to be enjoined are illegal.¹⁰ A complaint alleging that the supervisors of a county, in pursuance of a fraudulent and collusive agreement with the purchaser, have made sales, and are about to make other sales, of tax certificates belonging to the county for less than their value, and that the burden of taxation will thereby be increased, states a cause of action in favor of a tax-payer, suing on behalf of himself and other tax-payers, to restrain further sales.¹¹ As a general rule, if the petition contains no allegations of fraud, an injunction will be dissolved upon the filing of an answer denying fully and explicitly the equities alleged in the petition.¹² The denial of an application for injunction, on account of the want of a material averment and sufficient evidence, is no obstacle to granting a second similar application sufficient in form and supported by evidence.¹³

1 *Latham v. Cusick*, 1 Utah, 242; *Waldron v. Marsh*, 5 Cal. 119; *Branch v. Supervisors*, 13 Cal. 190; *Van Wert v. Webster*, 31 Ohio St. 420; *Battle v. Stevens*, 32 Ga. 25; *Mechanics' Foundry v. Ryall*, 62 Cal. 416. See *Turner v. Stewart*, 78 Mo. 480; *McPike v. West*, 71 Mo. 199.

2 *City of Portland v. Baker*, 8 Oreg. 356; *Carlisle v. Stevenson*, 3 Md. Ch. 499.

3 *St. Louis v. Knapp Company*, 104 U. S. 658.

4 *Sullivan v. Moreno*, 19 Fla. 200. See *Heagy v. Black*, 90 Ind. 534.

5 *Vanwinkle v. Curtis*, 3 N. J. Eq. 422.

6 *Faust v. City of Huntington*, 91 Ind. 493.

7 *Sidener v. Haw Creek Turnp. Co.* 91 Ind. 186.

8 *Sidener v. Haw Creek Turnp. Co.* 91 Ind. 186.

9 *Palmer v. Hayes*, 93 Ind. 199.

10 *Blanc v. Meyer*, 59 Tex. 89. See *Babcock v. Fond du Lac*, 58 Wis. 230, *Town of Cicero v. Williamson*, 91 Ind. 541.

11 *Willard v. Comstock*, 58 Wis. 565. See *Roe v. Lincoln Co.* 56 Wis. 66; *Lynch v. Railroad Co.* 57 Wis. 430. In a suit to enjoin the collection of a township tax levied for an appropriation to a railroad company to aid in the construction of its road, it is good pleading to state in a single paragraph of complaint all the facts leading to and resulting in the levy of the tax, and then to set forth in the same paragraph, but in separately numbered clauses or specifications, each several ground of objection to the validity of the tax, and the sufficiency of each clause or specification may be tested by a demurrer for the want of facts. *Scott v. Hansheer*, 84 Ind. 1; *Mustard v. Hoppess*, 69 Ind. 324. And see *Sheets v. Longlois*, 69 Ind. 491.

12 *Carrothers v. Newton Mineral Spring Co.* 61 Iowa, 681. See *Sinnett v. Moles*, 38 Iowa, 25. A party desiring to procure the dissolution of an injunction on the ground of having denied the equities of the complaint, must controvert directly every material allegation of such complaint. *Oro Fino Min. Co. v. Cullen*, 1 Idaho, 113.

13 *Halcombe v. Commissioners etc.* 89 N. C. 246. And see *Jones v. Thorne*, 80 N. C. 72.

§ 154. **Innkeeper.**—The obligation resting upon an innkeeper to keep his guest safe is one imposed by law and not growing out of contract, and for a violation of it the action is an action on the case for the injury sustained, and not an action for breach of contract;¹ and allusions in the complaint to the formal contract between the plaintiff and the proprietor of the hotel cannot change the true character of the action.² By the common law, an innkeeper is bound to take uncommon care of the goods, money, and baggage of his guests;³ and in an action against innkeepers, it is a sufficient allegation in the complaint to state that the plaintiff as a guest was entertained by the defendants as innkeepers, to hold them to liability as such for a loss of goods.⁴ Merely fixing the price to be paid does not make the person a boarder rather than a guest.⁵ In an action to recover for the loss of goods by an innkeeper, demand before action need not be averred, nor is it necessary to aver negligence.⁶ To enforce an alleged lien on the baggage, etc., of a guest, for charges for

lodging, etc., the plaintiff must allege in his complaint that he is an innkeeper, and the allegation that he "is landlord and proprietor of the house" is insufficient.¹

1 *Stanley v. Bircher*, 78 Mo. 245.

2 *Stanley v. Bircher*, 78 Mo. 245, 247.

3 *Batterson v. Vogel*, 8 Mo. App. 24; *Lusk v. Belote*, 22 Minn. 468; *Stanley v. Bircher*, 78 Mo. 245; *Vance v. Throckmorton*, 5 Bush, 41; *Lanier v. Youngblood*, 73 Ala. 587.

4 *Prescott v. Bruce*, 2 Cin. Rep. 58. And see *Peet v. McGraw*, 25 Wend. 653.

5 *Hancock v. Rand*, 17 Hun, 279; 94 N. Y. 1; 46 Am. Rep. 112. And see *Norcross v. Norcross*, 53 Mo. 169; *Pinkerton v. Woodward*, 33 Cal. 557; *Pollock v. Lauds*, 36 Iowa, 651; *Mowers v. Fethers*, 61 N. Y. 34; 19 Am. Rep. 244.

6 *Willard v. Reinhardt*, 2 Smith, E. D. 148; *McDonald v. Edger-ton*, 5 Barb. 560. As to the averment of negligence under a statute limiting the innkeeper's liability: See *Elcox v. Hill*, 98 U. S. 218; *Fuller v. Coats*, 18 Ohio St. 343.

7 *Southwood v. Myers*, 3 Bush, 681.

§ 155. **Insurance—Fire.**—A policy of fire insurance is void unless the party insured has at the time an insurable interest in the property insured.¹ And a complaint in an action on the policy must contain an averment of such an interest in order to state a cause of action.² The complaint should allege distinctly an insurable interest at the time of insuring, and also at the time of the loss;³ though it was held that an averment of an insurable interest at the time of effecting the insurance is sufficient, as the legal presumption is that such interest continues.⁴ So the character of the interest need not be specified.⁵ And it was held that an allegation of insurance to the plaintiff on "his" building, and on "his" water-wheel, etc., sufficiently shows an insurable interest.⁶ As it regards averment of loss, it is sufficient if it be averred that the loss arose from a peril insured against, and the complaint need not aver that the loss did not accrue from one of the excepted causes specified in the policy;⁷ an averment that the loss was caused by fire, and not by the falling of any

building, is equivalent to an averment that it was not caused by a fire which ensued from the falling of a building.⁸ Under an averment of a total loss, a party may recover for a partial loss.⁹ Where a compliance with the conditions of a fire policy as to notice and proof of loss and damage are precedent to a right of recovery, it must be alleged in the complaint.¹⁰ If there is nothing in the terms of a policy requiring the truth of the representations in the application therefor to be averred as precedent to a right of action, a good cause of action may be made in a complaint founded on the policy, without setting forth the application and averring the truth of the representations therein;¹¹ but the falsity of such representations, where they are such as to invalidate the policy, may be set up by way of defense.¹²

1 Quarrier v. Insurance Co. 10 W. Va. 507, 522; Fowler v. Insurance Co. 26 N. Y. 422; Freeman v. Insurance Co. 38 Barb. 247; 14 Abb. Pr. 398.

2 Freeman v. Insurance Co. 38 Barb. 247; 14 Abb. Pr. 398. See Pitney v. Insurance Co. 61 Barb. 335; 65 N. Y. 6.

3 Quarrier v. Insurance Co. 10 W. Va. 507; Freeman v. Insurance Co. 38 Barb. 247; 14 Abb. Pr. 398. And see Ruse v. Insurance Co. 23 N. Y. 516.

4 Roussel v. Insurance Co. 9 Jones & S. 279.

5 Quarrier v. Insurance Co. 10 W. Va. 507, 523.

6 Fowler v. Insurance Co. 23 Barb. 143. And see Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520; Young v. Insurance Co. 61 N. Y. 650. But see Union Ins. Co. v. McGookey, 33 Ohio St. 555, 561.

7 Hunt v. Insurance Co. 2 Duer, 481; Lounsbury v. Insurance Co. 8 Conn. 459; Ferrer v. Insurance Co. 47 Cal. 416.

8 Ferrer v. Insurance Co. 47 Cal. 416.

9 Peoria etc. Ins. Co. v. Whitehill, 25 Ill. 466.

10 Williams v. Insurance Co. 54 N. Y. 577. See Levy v. Insurance Co. 10 W. Va. 560.

11 Union Ins. Co. v. McGookey, 33 Ohio St. 555. And see Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20; Guardian etc. Ins. Co. v. Hogan, 80 Ill. 35.

12 Union Ins. Co. v. McGookey, 33 Ohio St. 555. In a suit upon a premium note given to a mutual insurance company, the complaint must show that the losses which are to be paid by the money arising from the assessments occurred during the time covered by the policy issued as the consideration of the note: Whitman v. Mason, 40 Ind. 183; Embree v. Shideler, 36 Ind. 423.

§ 156. **Insurance—Life.**—All that is necessary in the complaint to make out a cause of action upon a policy of life insurance is a statement of the contract, the death of the assured, and the failure to pay as agreed ;¹ an allegation that the death of the assured was not caused by the breaking of any of the conditions of the policy is unnecessary, and does not require proof.² The plaintiff is not bound to anticipate in the complaint the defense which the defendant may set up, and has a right to rely, in complaining, upon such averments as state a cause of action, leaving matter which would meet a defense for proof, or argument from proof, at the trial.³ When the answer admits the issuing of the policy and the allegations in the complaint, and alleges a breach of its conditions, the burden of proof is upon the defendant, and the plaintiff is entitled to recover unless the defendant satisfies the court or jury, by a preponderance of evidence, that the conditions had been broken.⁴ An allegation in the complaint that the defendant had waived a certain provision of the policy as to intemperance was held not to be an admission that the deceased had violated this provision.⁵ Where the policy recited the consideration to be a certain sum of money then and there paid, and a like amount to be paid annually, on a designated day, to the insurance company, it was held that the consideration was sufficiently stated, and that it was not necessary to set out the accruing obligations, if any such were separately given.⁶ In an action on a policy procured by the insured for the benefit of the plaintiff, it is not necessary to aver that the plaintiff had any interest in the life of the insured, but the rule is otherwise where one procures an insurance on the life of another ;⁷ in the latter case, the plaintiff must aver that he had an insurable interest in the life insured.⁸ Where by the express

terms of the policy "the proposals, answers, and declarations" made by the applicant are made a part of the policy, they should be stated in the complaint in an action founded upon the policy.⁹

1 *Murray v. N. Y. Life Ins. Co.* 9 Abb. N. C. 300; 85 N. Y. 236. And see *Mass. etc. Life Ins. Co. v. Kellogg*, 82 Ill. 614.

2 *Murray v. N. Y. Life Ins. Co.* 9 Abb. N. C. 300; 85 N. Y. 236.

3 *Cahen v. Continental Life Ins. Co.* 69 N. Y. 300.

4 *Van Valkenburg v. American etc. Life Ins. Co.* 70 N. Y. 605; *Jones v. Brooklyn Life Ins. Co.* 61 N. Y. 70; *Murray v. N. Y. Life Ins. Co.* 9 Abb. N. C. 300; 85 N. Y. 236.

5 *Hagadorn v. Conn. Mut. Life Ins. Co.* 22 Hun, 249.

6 *Mutual etc. Ins. Co. v. Cannon*, 43 Ind. 264.

7 *Guardian etc. Life Ins. Co. v. Hogan*, 80 Ill. 35; *Mass. etc. Life Ins. Co. v. Kellogg*, 82 Ill. 614.

8 *Guardian etc. Life Ins. Co. v. Hogan*, 80 Ill. 35.

9 *Bobbitt v. Liverpool etc. Ins. Co.* 66 N. C. 70; 8 Am. Rep. 434; *Bidwell v. Conn. Life Ins. Co.* 3 Sawy. 281.

§ 157. *Insurance—Marine.*—In an action upon a marine policy of insurance, an averment in the complaint of interest in the insured is not required, in order to sustain a recovery.¹ But an averment of the performance of conditions precedent is necessary, as is the case in actions on insurance policies generally, and the proof must sustain the averment.² If the policy is an open one, and is for the insurance of such sums as shall be specified by application, and mutually agreed upon and indorsed upon the policy, it is necessary, in a pleading based upon the policy, to aver that an amount had been mutually agreed upon and indorsed upon the policy.³

1 *Freeman v. Insurance Co.* 33 Barb. 247; 14 Abb. Pr. 393.

2 See *Carberry v. German Ins. Co.* 51 Wis. 605; *Edgerly v. Farmers' Ins. Co.* 43 Iowa, 587; *Buford v. Insurance Co.* 5 Oreg. 334; *St. Louis Insurance Co. v. Kyle*, 11 Mo. 185. See as to what amounts to a sufficient averment of a total loss: *Wright v. Williams*, 20 Hun, 320.

3 *Crane v. Evansville Ins. Co.* 13 Ind. 446. See *Young v. Phoenix Ins. Co.* 61 N. Y. 650.

BOONE PLEAD.—25.

§ 158. **Insurance—Answer.**—Under a general denial in the answer, the defendant cannot prove a defense based on a breach of any conditions in the policy other than such as are conditions precedent to the right of the plaintiff to recover.¹ Breaches of conditions other than conditions precedent must be specially pleaded.² Evidence of a breach of warranty by the insured is inadmissible unless alleged in the answer.³ So a condition that the insured, if requested, should exhibit to the insurer, upon adjustment of loss, his books of account, invoices, etc., is not included in a general allegation by the plaintiff of performance of conditions precedent, and a breach of such condition must be specially averred.⁴ Under a stipulation in the policy, that if the risk be increased by any means within the control of the insured the insurance shall be void, the insured is not to plead and prove affirmatively that it has not been thus increased, but if it has, it is matter of defense to be alleged and proved by the defendant.⁵ An answer simply setting up that the risk has been increased, contrary to the condition of the policy, will not sustain a defense of false representations or breach of warranty.⁶ An answer setting up a false statement in the application should state the particular violation claimed;⁷ thus, after setting forth that the insured answered that certain relatives were not afflicted with any hereditary disease, it is not enough to allege generally that such answer was false.⁸ An answer that the plaintiff fraudulently stated the amount of loss to be greater than it was, without showing that the statement was made to the company or its agent, or in any transaction in relation to the loss, is bad.⁹ In an action upon a life insurance policy, an answer, alleging in general terms that the insured came to his death while engaged in the known violation of law by committing

an assault and battery, and specifically stating facts constituting an assault and battery, is sufficient, although the term "unlawful" is not used.¹⁰ In a suit on a fire insurance policy, a defense that the plaintiff burned his own property must be specially averred.¹¹

1 *Bennett v. Maryland Fire Ins. Co.* 14 Blatchf. 422; *Redman v. Aetna Ins. Co.* 49 Wis. 431; *Mitchell v. Home Ins. Co.* 32 Iowa, 421.

2 *Bennett v. Maryland Fire Ins. Co.* 14 Blatchf. 422.

3 *Weed v. Schenectady Ins. Co.* 7 Lans. 452; *Boos v. World Mut. Life Ins. Co.* 6 Thomp. & C. 384; *Redman v. Aetna Ins. Co.* 49 Wis. 431; *Kentucky etc. Ins. Co. v. Southard*, 8 Mon. B. 634.

4 *Mueller v. Putnam Fire Ins. Co.* 45 Mo. 84. Where a condition becomes operative only in the event of a request in writing, the answer must aver such request: *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315.

5 *Newman v. Springfield etc. Ins. Co.* 17 Minn. 123.

6 *Whitney v. Black River Ins. Co.* 9 Hun, 37.

7 *Studwell v. Charter Oak Life Ins. Co.* 17 Hun, 602.

8 *Studwell v. Charter Oak Life Ins. Co.* 17 Hun, 602.

9 *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315.

10 *Bloom v. Franklin Life Ins. Co.* 97 Ind. 478. See *Murray v. Insurance Co.* 98 N. Y. 614.

11 *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 163.

§ 159. *Interpleader.*—Interpleader is a remedy asking the direction of the court to which of two adverse claimants the plaintiff should pay a fund, or deliver property to which he claimed no right, and further to be protected from such adverse claimants.¹ The object of such an action is to protect a person standing in the situation of a stakeholder;² and it cannot be maintained except in cases where the plaintiff can be protected in no other way from an unjust litigation in which he has no interest.³ In order to maintain the action the complainant must disclaim any interest in the subject thereof,⁴ and it must be averred that he is uncertain to whom the right belongs, and that he cannot determine the right without hazard to himself.⁵ So he must make affidavit that he does not collude with either claimant,⁶ and he must bring, or offer to bring,

the money or thing claimed into court.¹ If the complaint fails to show that each of the defendants claim a right, and such a right as they may interplead for, both may demur, one because no claim of right is shown against him, the other because the complaint, showing no claim of right in the co-defendant, shows no cause of interpleader.²

1 *Bedell v. Hoffman*, 2 Paige, 199. And see *Sherman v. Partridge*, 11 How. Pr. 154; 4 Duer, 646; 1 Abb. Pr. 256; *Delaney v. Murphy*, 24 Hun, 503; *Pustel v. Flannelly*, 60 How. Pr. 67; *Board of Education v. Scoville*, 13 Kan. 17; *McDonald v. Allen*, 37 Wis. 108; *Rohrer v. Turrill*, 4 Minn. 407.

2 *Badeau v. Rogers*, 2 Paige, 209; *Patterson v. Perry*, 14 How. Pr. 505.

3 *N. Y. etc. R. R. Co. v. Haws*, 3 Jones & S. 372; *McDonald v. Allen*, 37 Wis. 108; *Smith v. Kuhl*, 25 N. J. Eq. 33.

4 *Atkinson v. Manks*, 1 Cowen, 691; *Marvin v. Ellwood*, 11 Paige, 365; *Anderson v. Wilkison*, 10 Smedes & M. 601; *Killian v. Ebbinghaus*, 110 U. S. 563.

5 *Atkinson v. Manks*, 1 Cowen, 691; *N. Y. etc. R. R. Co. v. Haws*, 3 Jones & S. 372; *Shaw v. Costa*, 8 Paige, 339; *Morgan v. Fillmore*, 1 *Sheld.* 62.

6 *Starling v. Brown*, 7 Bush, 164; *Atkinson v. Manks*, 1 Cowen, 691; *Snodgrass v. Butler*, 54 Miss. 45.

7 *Starling v. Brown*, 7 Bush, 164; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Atkinson v. Manks*, 1 Cowen, 691. A bill of interpleader is not bad because bringing into court a less sum of money than is due, if it contains an offer to pay what is due: *Ketcham v. Brazil Block Coal Co.* 83 Ind. 515.

8 *Starling v. Brown*, 7 Bush, 164.

§ 159 a. **Intervention.**—The right of intervention rests upon the principle that a party should be permitted to do that voluntarily which, if known, a court of equity would require to be done.¹ The right is provided for by statute in several of the Code States, having been adopted substantially from the civil law as found in the State of Louisiana.² As generally provided, an intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding

anything adversely to both the plaintiff and the defendant.³ To entitle a person to intervene, he must have such an interest in the matter in litigation that he would either gain or lose by the direct legal operation and effect of the judgment which might be rendered in the suit between the original parties.⁴ The intervention is made by complaint, setting forth the grounds upon which the intervention rests;⁵ and all the pleadings therein are governed by the same principles and rules as obtain in other pleadings.⁶ The intervenor must by averment show that his rights are involved in the cause which is being litigated, that he is entitled to the relief which he asks, and his application must be presented in time to enable the parties in the cause in which he desires to intervene to meet and contest the issues which may be presented by him.⁷ The right to intervene can be exercised for certain purposes only, and under a proper state of facts, which should be set forth in the intervenor's complaint or petition.⁸ If there is no statement of any fact which entitles the petitioner to intervene, the petition must be treated the same as a complaint which fails to state facts sufficient to constitute a cause of action.⁹ If the petition shows no cause of action upon which the intervenor could recover in any suit, or a cause defectively stated, it is held that a demurrer affords the remedy to one adversely interested;¹⁰ but when the cause of action, though good on its face, does not authorize an intervention in the particular suit, a motion to dismiss is proper.¹¹ It is held to be impossible by one petition to intervene in three distinct and unconsolidated actions;¹² nor can one be bound by an adjudication upon a petition of intervention filed by another claiming to be his agent.¹³ A petition of intervention on the part of subsequent attaching creditors, seeking to intervene in an

attachment suit, must show that the interest of the parties complaining in the attached property had suffered, or was likely to do so, from the alleged fraudulent transactions between the original parties to the suit.¹¹ Where a subsequent attaching creditor intervenes in an action for the purpose of setting aside an attachment issued therein, on the ground that there is no debt due from the defendant to the plaintiff, the allegations in the pleading on the part of the intervenor traversing the complaint have the same effect as denials in an answer, and require affirmative proof by the plaintiff of his cause of action, in default of which the intervenor will have judgment in his favor.¹² After a petition of intervention has been filed, an appeal will lie from an order of the court striking it from the files,¹³ or from an order refusing to do so.¹⁴

1 Pool v. Sanford, 52 Tex. 621, 633.

2 See Cal. Code Civ. Proc. § 387; Whitman v. Willis, 51 Tex. 425; Pool v. Sanford, 52 Tex. 633; Speyer v. Ihmels, 21 Cal. 286; Lewis v. Harwood, 28 Minn. 433; Harlan v. Eureka Min. Co. 10 Nev. 95.

3 Cal. Code Civ. Proc. § 387; Iowa Code, § 2685; Minn. Gen. Stats. (1878) ch. 66, § 131; Nev. Stats. (1869) p. 287, § 500.

4 Horn v. Volcano Water Co. 13 Cal. 69; Speyer v. Ihmels, 21 Cal. 286; Harlan v. Eureka Min. Co. 10 Nev. 92. And see Taylor v. Adair, 22 Iowa, 282; Coffey v. Greenfield, 55 Cal. 383; Meyberg v. Steagall, 51 Tex. 354; Dunham v. Greenbaum, 56 Iowa, 303; King v. Harper, 33 La. An. 496.

5 Cal. Code Civ. Proc. § 387.

6 Rosenbaum v. Adams, 61 Iowa, 332, 334; Lewis v. Harwood, 28 Minn. 428, 430.

7 Smith v. Allen, 23 Tex. 501.

8 Nennet v. Schluter, 62 Tex. 327.

9 Harlan v. Eureka Min. Co. 10 Nev. 92.

10 Ragland v. Wisrock, 61 Tex. 397. See Hanchett v. Gray, 7 Tex. 531; Smith v. Allen, 23 Tex. 497.

11 Ragland v. Wisrock, 61 Tex. 397.

12 Rosenbaum v. Adams, 61 Iowa, 332.

13 Rosenbaum v. Adams, 61 Iowa, 332.

14 Nennet v. Schluter, 62 Tex. 327. See Coghill v. Marks, 23 Cal. 676.

15 Speyer v. Ihmels, 21 Cal. 286.

16 People v. Pfeiffer, 59 Cal. 90.

17 First Nat. Bank v. Gill, 50 Iowa, 425.

§ 160. **Judgments—Complaint.**—It has generally been held that in pleading on a judgment of a court of general jurisdiction, it is unnecessary to aver that the court had jurisdiction, and the presumptions in favor of jurisdiction are the same, whether the judgment relied on is domestic or foreign, or one of a court of a sister State.¹ If the complaint sets forth the name of the court, the date or term at which the judgment was recovered, and the amount of the recovery, it will be sufficient without stating the proceedings.² If the court had no jurisdiction, that fact should be set up in defense.³ But according to the decisions in some of the States as it regards foreign judgments, the jurisdiction cannot be presumed, and must be expressly alleged;⁴ it is held that the complaint must allege in some form, facts which show that the court rendering the judgment had jurisdiction both of the subject-matter and of the person of the defendant.⁵ But an averment that the court was one of general jurisdiction, without averring that it had jurisdiction of the person, was held sufficient on demurrer.⁶ Although in an action upon a foreign judgment it may be sufficient to plead generally the jurisdiction of the court which rendered it, yet where the complaint pleads specially the facts on which the jurisdiction rests, and jurisdiction exists only by virtue of a statute of that State, a general averment of jurisdiction is not sufficient, and it is necessary to plead such statute.⁷ In an action on a judgment, the complaint need not aver that an execution has been issued on the judgment, and an unsuccessful effort made to collect it;⁸ nor is it necessary to aver that such judgment is in full force and virtue.⁹ In an action by an assignee of a judgment, an averment of the assignment of the judgment is necessary, and a denial of the averment necessarily presents a material issue;¹⁰ but it is not necessary to allege any demand of

payment by the assignee, or any refusal to pay by the debtor; ¹¹ nor need the assignee allege a consideration for the transfer of the judgment.¹² The law presumes nothing in favor of the jurisdiction of Justices' Courts, and a party who asserts a right under the judgment of a justice must affirmatively show every fact necessary to confer such jurisdiction.¹³ In an action to set aside a former judgment between the same parties on the ground of mistake, if the complaint fails to make explanation of the mistake, or the causes which produced it, it fails to set forth facts sufficient to constitute a cause of action.¹⁴ A petition which avers that the plaintiff was misled by a statement of the trial judge that a new trial would be granted, and that new counsel having been employed by the plaintiff, the original counsel refused the use of his notes of the trial in making a bill of exceptions, presents no ground for relief against the judgment.¹⁵

1 Butcher v. Bank of Brownsville, 2 Kan. 70; Dodge v. Coffin, 15 Kan. 277; Phelps v. Duffy, 11 Nev. 80; Bruckman v. Taussig, 7 Colo. 561. And see Low v. Burrows, 12 Cal. 181; Dougherty v. Longmore, 2 Cin. Rep. 134; Stephens v. Roby, 27 Miss. 744; Holmes v. Campbell, 12 Minn. 221; Frees v. Ford, 7 N. Y. 176; Spaulding v. Baldwin, 31 Ind. 376; Reid v. Boyd, 13 Tex. 241.

2 Bruckman v. Taussig, 7 Colo. 561. And see Martin v. Moore, 1 Wyom. 22; Springsteene v. Gillet, 30 Hun, 260. It is not necessary to state the facts conferring jurisdiction: Springsteene v. Gillet, 30 Hun, 260; Campe v. Lassen, Sup. Ct. Cal. 6 West C. Rep. 771.

3 Bruckman v. Taussig, 7 Colo. 561; Phelps v. Duffy, 11 Nev. 80.

4 Kans v. Kunkle, 2 Minn. 313. And see McLaughlin v. Nichols, 13 Abb. Pr. 244.

5 Gebhard v. Garnier, 12 Bush, 321.

6 Tenney v. Townsend, 9 Blatchf. 274.

7 Kellam v. Toms, 38 Wis. 532. See Loop v. Gould, 25 Hun, 387.

8 King v. Blood, 41 Cal. 314. See Goodin v. McArthur, 4 Cin. Bull. 215; Headley v. Roby, 6 Ohio, 521; Linton v. Hurley, 114 Mass. 76.

9 Blake v. Burley, 9 Iowa, 592; Campbell v. Cross, 39 Ind. 155; Masterson v. Matthews, 60 Ala. 260.

10 Hughes v. Brewer, 7 Colo. 583. The mere averment that a judgment has been recovered in another State, followed by the averment of its assignment to the plaintiff, is not sufficient, in the absence of any further allegations, to make out a cause of action: Horton v. Shipherd, 14 N. Y. Week. Dig. 453.

11 *Moss v. Shannon*, 1 Hilt. 173.

12 *Cottle v. Cole*, 23 Iowa, 481.

13 *Swain v. Chase*, 12 Cal. 283; *Dick v. Wilson*, 10 Oreg. 490. And see *Grant v. Bledsoe*, 20 Tex. 456; *McElfatrick v. Taft*, 10 Bush, 160; *Sheldon v. Hopkins*, 7 Wend. 435; *Jolley v. Foltz*, 34 Cal. 321; *Toledo etc. R. R. Co. v. McNulty*, 34 Ind. 531.

14 *Douglass v. Brooks*, 38 Cal. 670. And see *Reid v. Mitchell*, 93 Ind. 469. See as to sufficiency of complaint in action to set aside a judgment as against equity: *McMurray v. McMurray*, 66 N. Y. 174; *Ormsby v. Jacques*, 12 Hun, 443; *Stillwell v. Carpenter*, 59 N. Y. 414; *Hamel v. Grimm*, 10 Abb. Pr. 160.

15 *Welse v. Schuler*, 13 Mo. App. 583.

§ 161. **Judgments—Answer.**—A judgment, if it can be successfully pleaded at all, cannot be pleaded in abatement, but only in bar.¹ The defendant may set up, in bar of a recovery in an action on a judgment, matters which were a proper ground of defense in the original action, accompanied with a showing that he was prevented from availing himself of the defense in the former action, by his ignorance of the facts on which it rested, and that this ignorance was not imputable to any negligence or laches on his part.² He may set up that the judgment was obtained by fraud.³ And in a suit brought on a foreign judgment obtained by fraud, that plea may be set up, and will constitute a complete bar to a recovery.⁴ So any state of facts which would be sufficient to avoid the judgment in the State in which it was rendered may be pleaded as a defense to the action.⁵ A general denial as an answer to an action on a judgment does not put in issue the regularity of the proceedings on which the judgment was based, or the correctness of the judgment, and the only inquiry that can be made on such an issue when the judgment is offered in evidence is, was such a judgment rendered, and had the court rendering it jurisdiction of the parties and the subject-matter.⁶ Where a general denial is pleaded in an action on a foreign judgment, a further answer of *nul tiel record* is surplusage.⁷

But in an action on a judgment, the defendant will not be permitted to show, under a general denial, that the judgment sued on was, subsequent to its entry, vacated by order of court;⁸ the vacation of the judgment should be specially pleaded, as matter in avoidance.⁹ In a suit against two defendants on a foreign judgment, one of such defendants can plead a want of jurisdiction in the foreign court over his co-defendant.¹⁰ If one is sued individually, upon a judgment obtained against him as administrator, and wishes to take advantage of such variance, he should plead *nul tiel record*, and by pleading to the merits he waives the objection.¹¹ Where the judgment of an inferior court, as that of a justice of the peace of another State, is relied upon as a cause of action or as a ground of defense, the party pleading it must show affirmatively the jurisdiction of such court to render the judgment.¹²

1 Harvey v. State, 94 Ind. 159. To operate as a bar, it must be specially pleaded as such: Henderson v. Scott, 32 Hun. 412; Mayor etc. v. Ketchum, 67 How. Pr. 161. But in pleading a former adjudication, it is not necessary to file a copy of the judgment: Davenport v. Barnett, 51 Ind. 329.

2 Spencer v. Vigneaux, 20 Cal. 442.

3 Culver v. Hollister, 17 Abb. Pr. 405; Dobson v. Peace, 12 N. Y. 156; Mandeville v. Reynolds, 5 Hun. 338; 68 N. Y. 528; Green v. Hallenbeck, 24 Hun. 116; Edgell v. Sigerson, 20 Mo. 494.

4 Coffee v. Neely, 2 Helsk. 304; Ward v. Quinlvin, 57 Mo. 425. In equity, judgments, whether foreign or domestic, may be declared void for fraud, in actions brought to enforce them: Ward v. Quinlvin, 57 Mo. 425; Marx v. Fore, 51 Mo. 69.

5 Rogers v. Gwin, 21 Iowa, 58. In an action on a foreign judgment, the defendant may plead as a defense the fact that in the original suit he was not served with process, and that the appearance entered on his behalf was fraudulent, notwithstanding that such defense contradicts the recitals contained in that record: Marx v. Fore, 51 Mo. 69. And see Arnott v. Webb, 1 Dill. 362; Harshey v. Blackmar, 20 Iowa, 161; Pollard v. Baldwin, 22 Iowa, 328. But one regularly sued and served, who answers and is in court when the case is tried, cannot, when sued on the judgment obtained, set up a promise made by the plaintiff before he brought suit that the judgment should not be used against the defendant: Greene v. Hallenbeck, 32 Hun. 469.

6 Union Pac. Railw. v. McCarty, 8 Kan. 123.

7 Westcott v. Brown, 13 Ind. 83. See Egan v. Tewksbury, 32 Ark. 43.

8 *Carpenter v. Goodwin*, 4 Daly, 89.

9 *Carpenter v. Goodwin*, 4 Daly, 89.

10 *Mackay v. Gordon*, 34 N. J. L. 236.

11 *Purvis v. Jackson*, 69 N. C. 474.

12 *Toledo etc. Rallw. Co. v. McNulty*, 34 Ind. 531; *Dick v. Wilson*, 10 Oreg. 490; *Hurd v. Shipman*, 6 Barb. 623. See *McElfatrick v. Taft*, 10 Bush, 160.

§ 162. *Landlord and tenant.*—The action for use and occupation is founded upon contract, and lies only when the relation of landlord and tenant exists.¹ If the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties, the action will not lie, but the party must sue in ejectment or trespass.² But a contract, in order to sustain the action, need not be express, but may be implied from circumstances.³ In such action it is not necessary to aver in the complaint how the relation of landlord and tenant arose between the parties;⁴ the plaintiff may declare for use and occupation, and recover on the special facts shown.⁵ Under a complaint declaring for use and occupation, the plaintiff can prove an occupation under a written or parol agreement for hiring, or such facts as will raise an implied promise to pay for the occupation of the premises, in case there was no express agreement.⁶ Where there is a lease under seal, either against the lessee or his assignee, the action must be upon the demise to recover the rent reserved, and an action for use and occupation cannot be maintained.⁷ But where a complaint was drawn as in an action for rent under a lease, and also as for a permissive use and occupation, the defendant not having objected to this mode of pleading, it was held that the plaintiff was entitled to recover if he proved a tenancy under the lease, or by permission of the plaintiff.⁸ Where ownership of the leased premises at the date of the lease is averred, it will be presumed to continue until the contrary is

affirmatively shown.⁹ And actual continued occupation is not necessary to be shown to entitle the plaintiff to sustain the action for use and occupation.¹⁰ But the plaintiff is bound to establish that the use and occupation was at the request of the defendant, and by the permission of the plaintiff.¹¹ Several parties cannot, in a joint action, recover for the use and occupation of two or more tracts of land, which they own in severalty.¹² In pleading an eviction by the lessor, it is not necessary to state in the answer all the facts constituting an eviction, but it may be averred generally.¹³ An eviction is no defense to a claim for rent which has become due, and the answer must aver that the tenant was evicted before the rent claimed fell due.¹⁴

1 Colt v. Planer, 4 Abb. Pr. N. S. 140; 7 Robt. 413; 51 N. Y. 647; Nance v. Alexander, 49 Ind. 516; La Farge v. Park, 1 Edm. Sel. Cas. 223; Lankford v. Green, 52 Ala. 103; Edmonson v. Kite, 43 Mo. 176; Aull Sav. Bank. v. Aull, 80 Mo. 199.

2 Espy v. Fenton, 5 Oreg. 423; Ramirez v. Murray, 5 Cal. 222; Folsom v. Carl, 6 Minn. 420. And see Hurd v. Miller, 2 Hilt. 540; Edmonson v. Kite, 43 Mo. 176; Ackerman v. Lynaun, 20 Wis. 454.

3 Despard v. Walbridge, 15 N. Y. 374; Rowland v. Pendleton, 21 Ohio St. 664; Porter v. Bleiler, 17 Barb. 149; Hall v. Southmayd, 15 Barb. 32; Moore v. Harvey, 60 Vt. 297.

4 Waters v. Clark, 22 How. Pr. 104.

5 Morris v. Niles, 12 Abb. Pr. 103.

6 Ten Eyck v. Houghtaling, 12 How. Pr. 528; Pierce v. Pierce, 23 Barb. 243; Waters v. Clark, 22 How. Pr. 104.

7 Klersted v. Railroad Co. 69 N. Y. 343.

8 Dean v. Leonard, 9 Minn. 190. See Ten Eyck v. Houghtaling, 12 How. Pr. 523.

9 Rhone v. Gale, 12 Minn. 51.

10 Little v. Martin, 3 Wend. 220; Westlake v. De Graw, 25 Wend. 669. If the landlord gives the power to occupy and enjoy, an action for use and occupation will lie, though there is no actual occupation: Hall v. Western Transp. Co. 34 N. Y. 234. See Prevot v. Lawrence, 51 N. Y. 219.

11 Hathaway v. Ryan, 35 Cal. 188; Sampson v. Schaeffer, 3 Cal. 196.

12 Tennant v. Pfister, 51 Cal. 511.

13 Rickert v. Snyder, 9 Wend. 415.

14 Vernam v. Smith, 15 N. Y. 327; McCarty v. Hudson, 24 Wend. 291. See Jackson v. Eddy, 12 Mo. 209; Edgerton v. Page, 20 N. Y. 234.

§ 163. **Libel and slander—Complaint.**—Under the Code system of pleading, it is sufficient in an action for a libel or slander to state generally that the defamatory matter was published or spoken of the plaintiff;¹ and it is not necessary to state any extrinsic fact, for the purpose of showing the application to the plaintiff of the defamatory matter.² But the Code has not dispensed with the necessity of inducement and innuendoes, where they are necessary to show the defamatory meaning of the words.³ The rule is, that where a publication is not defamatory on its face, and becomes so only by reference to extrinsic facts, the existence of those facts must be alleged;⁴ but where the words, by natural construction, tend to injure the plaintiff's reputation, or to subject him to hatred, contempt, or ridicule, no extrinsic averment is necessary.⁵ The office of an innuendo being merely explanatory, it cannot introduce new matter, nor in any degree enlarge the sense of the words to which it relates;⁶ the plaintiff cannot, by innuendoes, extend the meaning beyond what the words justify in connection with the extrinsic facts.⁷ And when the innuendo is not justified by the antecedent facts referred to, so that without it the words are not actionable, a demurrer to the complaint will lie.⁸ The complaint, in an action for libel or slander, must aver publication, that is, the communication of the alleged defamatory words to a third person.⁹ But the word "published" imports, *ex vi termini*, a speaking in the presence and hearing of somebody, and the presence of hearers need not be averred.¹⁰ So the use of the words "conversations," "discourses," "publish," and "declare," in the complaint, is a sufficient averment, implying the presence of hearers.¹¹ And if the complaint avers the presence of divers persons, this sufficiently denotes a publication, although not stating that

they heard or understood.¹² It is a sufficient allegation of publication of a libel by the defendant, to allege that he was the proprietor of the newspaper in which it was published;¹³ and it need not be alleged that the newspaper was a circulating newspaper, nor is it necessary to aver in detail the manner or extent of the publication.¹⁴ The precise words published should be set forth, and not their purport.¹⁵ Words published in a foreign language should be set forth in the language published, accompanied by an averment of their meaning in English.¹⁶ And where the words are alleged to have been published in a foreign language, the complaint should also aver that they were understood by those who heard them.¹⁷ And it is necessary to allege in the complaint that the defamatory matter complained of was published maliciously, or to use words of similar import;¹⁸ and the allegation of malice will not be supplied by implication, or be presumed from the false publication of words which are *per se* slanderous.¹⁹ Where the words used have a provincial meaning, and it is that meaning that gives them their force and effect as defamatory matter, then that provincial meaning must be averred as a traversable fact.²⁰ Where the libel or slander is not actionable *per se*, the plaintiff must not only allege special damages,²¹ but must prove that they were exclusively the consequence of the publication.²² And it has been held, that if the special damage was a loss of customers or of a sale of property, the persons who ceased to be customers or who refused to purchase must, if possible, be named, and if they are not named, that no cause of action is stated.²³ On the other hand, it was held that special damage might be proved by general evidence of the falling off of the plaintiff's business, without showing who the persons were who had ceased to deal with the plaintiff,

or that they were the persons to whom the statements were made.²¹

1 See *N. Y. Code Civ. Proc.* § 533; *Cal. Code Civ. Proc.* § 460; *Iowa Code*, § 2681; *Wesley v. Bennett*, 6 Duer, 688; 5 Abb. Pr. 438; *Stelber v. Wensel*, 19 Mo. 513; *Carsou v. Mills*, 69 N. C. 122.

2 *N. Y. Code Civ. Proc.* § 535; *Cal. Code Civ. Proc.* § 460. See *Fleischman v. Bennett*, 23 Hun, 200; 87 N. Y. 231; *Swearingen v. Stanley*, 23 Iowa, 115.

3 *Wallace v. Bennet*, 1 Abb. N. C. 478; *Stewart v. Wilson*, 23 Minn. 449; *Hamm v. Wickline*, 26 Ohio St. 81; *Phillips v. Baldwin*, 8 N. Y. Week. Dig. 194; *De Witt v. Wright*, 57 Cal. 578. Under the Iowa Code, it is not necessary to set out extrinsic facts showing that the words charged were used in a defamatory sense; it is sufficient to set out the words themselves, and state the defamatory sense in which they were used: *Clarke v. Jones*, 49 Iowa, 474. See *Wilkin v. Tharp* 55 Iowa, 610, 611; *Swearingen v. Stanley*, 23 Iowa, 115.

4 *Blaisdell v. Raymond*, 14 How. Pr. 265; 4 Abb. Pr. 446; *Fry v. Bennett*, 5 Sand. 54; *Wachter v. Quenzer*, 29 N. Y. 547; *Carroll v. White*, 33 Barb. 615; *Wilson v. Fitch*, 41 Cal. 378; *Maynard v. Fireman's Fund Ins. Co.* 47 Cal. 207; *Chamberlain v. Vance*, 51 Cal. 75; *Works v. Stevens*, 76 Ind. 181; *Emmerson v. Marvel*, 55 Ind. 265; *Lipprant v. Lipprant*, 52 Ind. 273; *Frank v. Dunning*, 38 Wis. 270; *Stewart v. Wilson*, 23 Minn. 440; *Smith v. Coe*, 22 Minn. 278; *Christal v. Craig*, 80 Mo. 367; *Legg v. Dunleavy*, 80 Mo. 558.

5 *More v. Bennett*, 48 N. Y. 472; *Dean v. Miller* 63 Ind. 440; *Langton v. Hagerty*, 35 Wis. 150.

6 *Bell v. Sun Printing etc. Assoc.* 3 Abb. N. C. 157; 10 Jones & S. 567; *Havemeyer v. Fuller*, 10 Abb. N. C. 9; 60 How. Pr. 316; *Blaisdell v. Raymond*, 14 How. Pr. 265; 4 Abb. Pr. 446; *Hurd v. Moore*, 2 Oreg. 85; *McFadin v. David*, 78 Ind. 445; 41 Am. Rep. 587; *Pollock v. Hastings*, 88 Ind. 248; *Cramer v. Noonan*, 4 Wis. 231.

7 *Sanderson v. Caldwell*, 45 N. Y. 393.

8 *Fleischman v. Bennett*, 23 Hun, 200; 87 N. Y. 231; 13 N. Y. Week. Dig. 561. See *Weed v. Bibbins*, 32 Barb. 315; *Carroll v. White*, 33 Barb. 615.

9 *Desmond v. Brown*, 33 Iowa, 13.

10 *Duel v. Agan*, 1 Code R. 134; *Guard v. Risk*, 11 Ind. 156; *Hutts v. Hutts*, 51 Ind. 581.

11 *Hurd v. Moore*, 2 Oreg. 85.

12 *Hanning v. Bassett*, 12 Bush, 361.

13 *Hunt v. Bennett*, 19 N. Y. 173.

14 *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Sprout v. Pillsbury*, 72 Me. 20.

15 *Finnerty v. Barker*, 7 N. Y. Leg. Obs. 316; *Hull v. Vreeland*, 18 Abb. Pr. 182; 42 Barb. 543; *Merritt v. Dearth*, 48 Vt. 65; *Forsyth v. Edmiston*, 5 Duer, 653; 2 Abb. Pr. 430; *Churchill v. Kimble*, 3 Ohio, 409. See *Deyo v. Brundage*, 13 How. Pr. 221; *Culver v. Van Anden*, 4 Abb. Pr. 375; *Kelly v. Waterbury*, 87 N. Y. 179; *Fleischman v. Bennett*, 23 Hun, 200; 87 N. Y. 231; *Burns v. Williams*, 88 N. C. 159.

16 *Lettman v. Ritz*, 3 Sand. 734; *Wormouth v. Cramer*, 3 Wend. 394; *Kerschbaugher v. Slusser*, 12 Ind. 453; *K. v. H.* 20 Wis. 239.

17 *K. v. H.* 20 Wis. 239; *Wormouth v. Cramer*, 3 Wend. 394.

13 *Eviston v. Cramer*, 47 Wis. 659; *Hovey v. Rubber Tip Pencil Co.* 57 N. Y. 119; *Hanning v. Bassett*, 12 Bush, 381. See *Andrew v. Deshler*, 43 N. J. L. 16; *Dillard v. Collins*, 25 Gratt. 343.

19 *Williams v. Gordon*, 11 Bush, 693. But see *Robinson v. Hatch*, 55 How. Pr. 55; *Burton v. Beasley*, 88 Ind. 401.

20 *Jones v. Diver*, 22 Ind. 184; *Seller v. Jenkins*, 97 Ind. 430. And see *Dias v. Short*, 16 How. Pr. 322; *Edsall v. Brooks*, 3 Robt. 284; *Wright v. Paige*, 36 Barb. 438; 3 Keyes, 581.

21 *Bell v. Sun Printing etc. Co.* 3 Abb. N. C. 157; 10 *Jones & S.* 567; *Bassell v. Elmore*, 65 Barb. 627; 48 N. Y. 561; *Gelsler v. Brown*, 6 Neb. 254; *Pollard v. Lyon*, 81 U. S. 225. If the words published are actionable *per se*, the plaintiff is entitled to recover the damages generally and necessarily resulting therefrom, whatever they may be: *Call v. Larabee*, 60 Iowa, 212; special damages need not, therefore, be alleged: *Call v. Larabee*, 60 Iowa, 212; *Swearingen v. Stanley*, 23 Iowa, 115.

22 *Wallace v. Bennett*, 1 Abb. N. C. 478.

23 *Hallock v. Miller*, 2 Barb. 530; *Stiebeling v. Lockhaus*, 21 Hun, 457; *Knickerbocker v. Ecclesine*, 11 Abb. Pr. N. S. 338. And see *Gelsler v. Brown*, 6 Neb. 254; *Cramer v. Cullinane*, 2 McAr. 197; *Bassell v. Elmore*, 48 N. Y. 561.

24 *Riding v. Smith*, Law R. 1 Ex. Div. 91; 16 Eng. 547. See *Bergmann v. Jones*, 94 N. Y. 15.

§ 164. **Libel and slander—Answer.**—Defenses in actions of libel or slander are either such as deny the publication of the words charged, or such as justify.¹ And the defendant may, in his answer, deny the publication of the defamatory matter charged, and in a second paragraph admit the publication and allege its truth,² and in still another admit the words, and without averring their truth or falsity, justify by alleging such facts as are relied on to excuse their publication.³ But when the only answer is a denial of the publication, nothing is admissible in evidence which tends either to prove the truth of the charge, or to establish a defense on the ground that the words were published on a justifiable occasion.⁴ A justification must be specially averred;⁵ and circumstances in mitigation cannot be proved unless they are pleaded.⁶ In all civil actions of libel or slander, if the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and

exempt from all civil responsibility.⁷ The truth pleaded in justification is a complete bar to the action, and the motive with which the publication was made is not material.⁸ But it is not sufficient to allege the truth of the matter charged as defamatory, and any mitigating circumstances, in general terms, without any statement of facts or particular circumstances;⁹ the answer must state the offense of which the plaintiff is alleged to have been guilty, giving time, place, and circumstances.¹⁰ In case of a general answer, the plaintiff's remedy is by motion to have it made more definite and certain;¹¹ but it is too late after verdict to attack such answer as insufficient.¹² And when the charge is specific, a general averment in the answer of its truth is held to be sufficient.¹³ Where the defamatory words allege a habit of committing a certain kind of unlawful act, as well as a specific instance of it, the answer may set up in defense or mitigation other specific instances of the same kind of act;¹⁴ as where the defamatory words charge a habit of stealing, as well as a specific theft, the defendant may set up in his answer various acts of larceny which the plaintiff had committed, in order to make good the charge.¹⁵ It is an established rule that a plea of justification must be as broad as the charge;¹⁶ and an answer setting up in justification "that the plaintiff had been indicted and arrested for a conspiracy to cheat and defraud" does not reach the charge of being a "scoundrel."¹⁷ An answer in justification of an alleged slander charging perjury, which alleges the plaintiff's testimony to have been false, but not alleging that it was known to him to be false, or that it was willfully and corruptly given, is bad on demurrer;¹⁸ such answer must allege facts sufficient to constitute the crime of perjury.¹⁹ Where the action is based on a charge imputing a crime, and there is an

answer of justification with evidence on the trial to sustain it, the plaintiff may prove his general character in rebuttal.²⁰ Whether a defense in an answer contains a justification must be determined by the language used in it, and it cannot be aided, enlarged, or improved by an introductory clause, characterizing it or expressing its purpose;²¹ such a clause is irrelevant, and may be stricken out.²² But allegations in the answer that the plaintiff is not the real party in interest, but the action is prosecuted by some one else in the plaintiff's name, are not irrelevant.²³ Where the words set out in the complaint are actionable *per se*, an answer setting up, by way of defense, that they were privileged, need not allege that they were uttered without malice.²⁴ The plea of justification is no aggravation of the wrong unless it be used by the defendant maliciously, with a knowledge of its falsity;²⁵ and mere inability to establish a justification is no evidence of malice, and will not warrant the inference of malice by a jury.²⁶ It is held to be proper for the defendant, in an action for defamatory words published concerning the plaintiff, to answer the allegation of intent, or *innuendo*, in the complaint or petition, by denying the slanderous intent imputed to him in the use of the words.²⁷

1 See *Harper v. Harper*, 10 Bush, 447.

2 *Thrall v. Smiley*, 9 Cal. 529; *Merk v. Gelzhaeuser*, 50 Cal. 631.

3 *Harper v. Harper*, 10 Bush, 447. And see *Fink v. Justh*, 14 Abb. Pr. N. S. 107; *Kelly v. Talntor*, 48 How. Pr. 270; *Hager v. Tibbits*, 2 Abb. Pr. N. S. 97; *Bush v. Prosser*, 11 N. Y. 347; *Dolevin v. Wilder*, 34 How. Pr. 488; 7 Robt. 319.

4 *Harper v. Harper*, 10 Bush, 447.

5 *Sunman v. Brewin*, 52 Ind. 140; *Duval v. Davey*, 32 Ohio St. 604; *Boaz v. Tate*, 43 Ind. 60.

6 *Willover v. Hill*, 72 N. Y. 36; *Blanchard v. Tulip*, 32 Hun. 638. But see *Duval v. Davey*, 32 Ohio St. 604; N. Y. Code Civ. Proc. § 536.

7 *Castle v. Houston*, 19 Kan. 417.

8 *Baum v. Clause*, 5 Hill, 196; *Root v. King*, 7 Cowen, 619; 4 Wend. 113.

9 *Wachter v. Quenzer*, 29 N. Y. 547; *Buddington v. Davis*, 6 How. Pr. 401; *Anibal v. Hunter*, 6 How. Pr. 255; *Castle v. Houston*, 19 Kan. 417; *Sunman v. Brewin*, 52 Ind. 140.

10 *Tilson v. Clark*, 45 Barb. 178; *Maretzek v. Cauldwell*, 19 Abb. Pr. 35; 2 Robt. 715; *Billings v. Waller*, 28 How. Pr. 97; *Robinson v. Hatch*, 55 How. Pr. 55.

11 *Van Wyck v. Guthrie*, 4 Duer, 268; 17 N. Y. 190.

12 *Castle v. Houston*, 19 Kan. 417.

13 *Van Wyck v. Guthrie*, 4 Duer, 268; 17 N. Y. 190.

14 *Kimball v. Fernandez*, 41 Wis. 329.

15 *Talmadge v. Baker*, 22 Wis. 625.

16 *Smith v. Tribune Co.* 4 Blas. 477; *Herr v. Bamberg*, 10 How. Pr. 123. And see *Palmer v. Smith*, 21 Minn. 419.

17 *Loveland v. Hosmer*, 8 How. Pr. 215. See *Jaycocks v. Ayres*, 7 How. Pr. 215.

18 *Downey v. Dillon*, 52 Ind. 442; *Spooner v. Keeler*, 51 N. Y. 527.

19 *Downey v. Dillon*, 52 Ind. 442. And see *United States v. Babcock*, 4 McLean, 113.

20 *Downey v. Dillon*, 52 Ind. 442.

21 *Kelly v. Waterbury*, 87 N. Y. 179.

22 *Kelly v. Waterbury*, 87 N. Y. 179.

23 *Moody v. Libbey*, 1 Abb. N. C. 154.

24 *Robinson v. Hatch*, 55 How. Pr. 55. See *Hamilton v. Eno*, 16 Huh, 599; 81 N. Y. 116.

25 *Klinck v. Colby*, 46 N. Y. 427; *Blasby v. Shaw*, 12 N. Y. 67; *Distin v. Rose*, 69 N. Y. 122; 7 Hun, 83; *Bush v. Prosser*, 11 N. Y. 306.

26 *Ald v. Fireman's Journal Co.* 10 Daly, 254.

27 *Wilkin v. Tharp*, 55 Iowa, 609. See *Fry v. Bennett*, 5 Sand. 54; 1 Code R. N. S. 238.

§ 165. *Lien, mechanic's—Complaint.*—A suit to enforce a mechanic's lien is essentially a suit in equity, and strict proof of all that is essential to the creation of the lien is required;¹ this includes proof of the commencement of the work, the character of the work, and when it was completed.² The existence of a lien is absolutely necessary to confer jurisdiction upon the court, and when no valid lien has been filed, the court cannot entertain the proceeding for the purpose of granting a personal judgment.³ The complaint or petition must set forth the facts which show that the plaintiff has a lien and the right to enforce it;⁴ it must show a full compliance with the statute in all respects.⁵ There can

be no enforcement of a lien until the debt for which the lien is made and held as security has become payable ;⁶ and a complaint or petition which fails to state that something was due for the services on which the lien was founded at the time the suit was commenced is fatally defective.⁷ But it is held that an amendment may be made in this respect ;⁸ and that although the complaint itself does not state that the debt is due, yet if that fact is stated in the petition which is embodied in and made a part of the complaint, it is sufficient.⁹ So the complaint may be amended so as to correct an erroneous description of the property.¹⁰ And an error in the name of the owner in the notice of claim may be corrected in the complaint by setting forth the mistake and averring the true owner.¹¹ The complaint must aver that the labor was performed under a contract, express or implied, but it is not necessary to name the contract, when the facts stated amount to a contract ;¹² so it must be shown that the contract was made with the owner or his agent.¹³ And it is not sufficient to allege in the complaint that a person contracted with the plaintiff, to entitle the plaintiff to make him a party defendant, and recover a personal judgment against him ;¹⁴ he only is a contractor who contracts with the owner of the premises.¹⁵ But under a complaint to enforce a mechanic's lien, alleging that the defendant is the owner of the land on which the building was erected, proof that the defendant is the owner of the building, with a right to remove it, and tenant for years of the land, is not a fatal variance, and will justify a decree for the sale of the building and term.¹⁶ The complaint should aver that the lien was filed within the time limited, before the commencement of the action ;¹⁷ but the omission is one which should be taken advantage of by demurrer, and is cured after trial and

verdict.¹⁸ So the complaint should describe the property to be charged, and allege that the defendant had an interest in the property.¹⁹ It should allege that the materials were furnished for the building sought to be charged with the lien, and it is not sufficient to aver that they were furnished to the contractor or owner, and were used in the construction of the building.²⁰

1 *Davis v. Alvord*, 94 U. S. 545; *Willer v. Bergenthal*, 50 Wis. 474; *Huse v. Washburn*, 50 Wis. 414. A proceeding to enforce a mechanic's lien in New York is not an action within the meaning of the Code, but a special proceeding: *Hallahau v. Herbert*, 57 N. Y. 409; *Leavy v. Gardner*, 63 N. Y. 624.

2 *Davis v. Alvord*, 94 U. S. 545; *Willamette Falls etc. Co. v. Smith*, 1 Oreg. 171; *Rowley v. James*, 31 Ill. 238.

3 *Childs v. Bostwick*, 65 How. Pr. 146; *Weyer v. Beach*, 79 N. Y. 412.

4 *Conkright v. Thompson*, 1 Smith, E. D. 661; *Foster v. Pollon*, 2 Smith, E. D. 556; *Mason v. Heyward*, 5 Minn. 74; *Tinsley v. Boykin*, 46 Tex. 599; *Shaw v. Allen*, 24 Wis. 564; *Pool v. Sanford*, 52 Tex. 621; *Gault v. Soldani*, 34 Mo. 150; *Hicks v. Murry*, 43 Cal. 515; *Hoffman v. Walton*, 36 Mo. 613.

5 *Pool v. Sanford*, 52 Tex. 621; *Kechler v. Stumme*, 4 Jones & S. 337; *Ark. etc. R. R. Co. v. McKay*, 30 Ark. 682.

6 *Harmon v. Ashmead*, 60 Cal. 439.

7 *Roberts v. Campbell*, 59 Iowa, 675; *Stubbs v. Railroad Co.*, 62 Iowa, 290; *Bailey v. Johnson*, 1 Daly, 67; *Lelegne v. Schwarzler*, 67 How. Pr. 130; 10 Daly, 547.

8 *Lelegne v. Schwarzler*, 67 How. Pr. 130; 10 Daly, 547.

9 *Huse v. Washburn*, 50 Wis. 414. But see *Stubbs v. Railroad Co.*, 62 Iowa, 290.

10 *Mann v. Schroer*, 50 Mo. 306; *Duffy v. Brady*, 4 Abb. Pr. 432; *Huse v. Washburn*, 50 Wis. 414. And see *McGee v. Piedmont Manuf. Co.* 7 S. C. 263.

11 *Lelegne v. Schwarzler*, 67 How. Pr. 130; 10 Daly, 547. And see *Hubbell v. Schreyer*, 15 Abb. Pr. N. S. 304. Compare *McElwee v. Sanford*, 53 How. Pr. 80.

12 *Nolan v. Lovelock*, 1 Mont. 224. And see *Fulton Iron Works v. Smelting Co.* 80 Mo. 285.

13 *Wilcox v. Keith*, 3 Oreg. 372; *Peck v. Bridwell*, 6 Mo. App. 451; *Clark v. Raymond*, 27 Wis. 456; *Porter v. Tooke*, 35 Mo. 107; *Shaw v. Allen*, 24 Wis. 563; *Clark v. Schatz*, 24 Minn. 300.

14 *Gothard v. Lavalle*, 4 N. Y. Month. Law Bull. 30.

15 *Gothard v. Lavalle*, 4 Y. N. Month. Law Bull. 30. And see *Wilcox v. Keith*, 3 Oreg. 372.

16 *McCarty v. Burnet*, 84 Ind. 23.

17 *Peck v. Hensley*, 21 Ind. 344; *Dean v. Wheeler*, 2 Wis. 224; *McCrea v. Craig*, 23 Cal. 522; *Ark. etc. R. R. Co. v. McKay*, 30 Ark. 682. And see *Hamilton v. Naylor*, 72 Ind. 171; *Lawton v. Case*, 73 Ind. 60.

18 *Skyrme v. Occidental Mill etc. Co.* 8 Nev. 219.

19 *Shaw v. Allen*, 24 Wis. 503; *Knox v. Starks*, 4 Minn. 20; *McCarty v. Van Etten*, 4 Minn. 461. And see *Thomas v. Smith*, 42 Pa. St. 68; *Harman v. Cummings*, 43 Pa. St. 322.

20 *Crawfordsville v. Barr*, 45 Ind. 258; *Hill v. Sloan*, 50 Ind. 181; *Lawton v. Case*, 73 Ind. 60.

2 166. *Lien, mechanic's — Answer.* — In a suit to enforce a mechanic's lien, it is held to be a good defense to the owner that there are liens upon the premises prior to that of the plaintiff, exceeding in amount the sum due from the owner.¹ And where the defenses were: (1) That the agreed price was payable by installments, and that the notice of lien was not filed within six months after the first installment became due; and (2) that there was an action at law pending to recover the same amount, it was held that the defenses were not irrelevant or frivolous.² Where the defendant in his answer denied all knowledge of the plaintiff's furnishing any materials, and that he gave him any notice of his lien, and then, as a counter-claim, alleged that the plaintiff guaranteed that the contractor should erect the building in a workmanlike manner, and complete it by a certain date, and asserted that neither condition was fulfilled, and claimed damages for their breach, it was held that this defense was admissible as a counter-claim, and was not inconsistent with the prior defenses.³ And where the answer set up the failure of the plaintiff to complete the work according to the written contract, and enumerated some of the particulars in which the work was defective, and claimed to recoup damages therefor, it was held that the plaintiff must prove performance in accordance with the written contract to entitle him to recover.⁴ The demand and refusal to pay, averred in the plaintiff's affidavit to foreclose a merchant's lien, may be traversed and denied by the defendant's counter-affidavit, and form an issue to be tried,

and if found against the plaintiff, his right to foreclose the lien fails.⁵ According to a California decision, where, in an action to enforce a mechanic's lien, the complaint alleges that the defendant has or claims an interest in the land which is subject to the lien, this allegation is wholly immaterial, and a general denial does not amount to a disclaimer of such interest, but only puts in issue the fact that it was subject to the lien.⁶

1 *Lehretter v. Koffman*, 1 Smith, E. D. 664.

2 *Webb v. Van Zandt*, 16 Abb. Pr. 190.

3 *McAdow v. Ross*, 53 Mo. 199. See *Winder v. Caldwell*, 14 How. 434.

4 *Haag v. Hilmeyer*, 15 N. Y. Week. Dig. 323. And see *Gourdier v. Thorp*, 1 Smith, E. D. 697.

5 *Moore v. Martin*, 58 Ga. 411.

6 *Elder v. Spinks*, 53 Cal. 293. But see opinion by Rhodes, J., 53 Cal. 295.

§ 167. **Malicious prosecution—Complaint.**—In an action for malicious prosecution the complaint must aver that the arrest and prosecution were malicious,¹ that there was no probable cause therefor,² and that the suit or proceeding in which the arrest was had terminated in favor of the party bringing this action.³ If the complaint fails to set out these material allegations, it fails to state facts sufficient to constitute a cause of action for malicious prosecution.⁴ An allegation of the "falsity of the charge" is not equivalent to an allegation of "the want of probable cause."⁵ Nor is the averment "without just or proper cause" equivalent to an averment of want of "probable cause";⁶ but the objection is not available when raised for the first time upon appeal.⁷ However false the charge might have been, if the person making it had probable cause for so doing, he would not be liable in a suit for malicious prosecution.⁸ And the complaint need not allege that the defendant *falsely*, as well as maliciously and without probable cause, made the accusation upon which the plaintiff

was arrested, tried, and convicted.⁹ The termination of the suit or proceeding alleged to have been malicious must be averred in the complaint;¹⁰ and it must also be averred that it terminated favorably to the plaintiff.¹¹ If an appeal is pending, it is held that the suit or proceeding is not determined.¹² But an allegation of a termination in the plaintiff's favor by the entry of a *nolle prosequi*, on motion of the district attorney and with leave of court, is sufficient.¹³ In an action for maliciously obtaining an order of arrest against the plaintiff, the complaint is defective if it omits to state that the order of arrest had been vacated, or that judgment had been rendered for the defendant therein, unless it appears that the order was a nullity *ab initio*.¹⁴ As it respects probable cause, proof of the actual guilt of the accused is conclusive evidence thereof, and if such proof be made, no action can be sustained by the accused, however plainly malice may be shown, or however improper may have been the motives of the person instituting the prosecution.¹⁵ If the plaintiff in this action desires to recover special damages, they should be specially averred, and the complaint should set out with particularity the causes which produced them.¹⁶ Thus, evidence of damages arising from the loss of boarders, growing out of the party's arrest, is not admissible, unless specially pleaded.¹⁷ And the amount of costs and counsel fees expended by the plaintiff in defending the prosecution is a matter of special damage, and to be recovered must be specially alleged and proved.¹⁸ In an action to recover damages for the abuse of legal process, it is unnecessary to allege or prove the termination of the prosecution;¹⁹ and such action may be sustained without proof of a want of probable cause, thus differing in two important respects from an action for malicious prosecution.²⁰ Nor need want of probable

cause be averred in an action for false imprisonment; ²¹ the material allegations in such action are, that the defendant imprisoned the plaintiff against his will, and without authority of law.²² But a cause of action for false imprisonment, and one for a malicious prosecution, when both arise out of the same transaction, may be alleged in different counts of the same complaint.²³ And a complaint containing averments making a case of malicious prosecution may be changed by amendment, so as to state a cause of action for false imprisonment; ²⁴ or *vice versa*.²⁵ And it was held that, where but a single detention is complained of, the plaintiff may allege such facts as show either a cause of action for false imprisonment, or one for malicious prosecution, or both.²⁶ According to the weight of authority, no action will lie for the institution and prosecution of a civil action with malice, and without probable cause, when there has been no arrest of the person or seizure of the property of the defendant, and no special injury sustained, which would not necessarily result in all suits prosecuted to recover for like causes of action.²⁷

1 *Hahn v. Schmidt*, 64 Cal. 234; *Tbaule v. Krekeler*, 81 N. Y. 423; *Laird v. Taylor*, 66 Barb. 131; *Fagan v. Knox*, 68 N. Y. 525; 1 Abb. N. C. 246; *Thompson v. Lumley*, 50 How. Pr. 105; 1 Abb. N. C. 254.

2 *Hogg v. Pinckney*, 16 S. C. 387; *John v. Duncan*, 2 N. Y. Month. Law Bull. 20; *King v. Montgomery*, 50 Cal. 115; *Richardson v. Virtue*, 2 Hun, 208; *Wanser v. Wyckoff*, 9 Hun, 173; *Lavender v. Hudgens*, 32 Ark. 763; *Dennehey v. Woodsum*, 100 Mass. 195; *Scotten v. Longfellow*, 40 Ind. 23; *Parsons v. Harper*, 16 Gratt. 64. The burden of proof is on the plaintiff to show want of probable cause and malice: *Sutton v. Anderson*, 103 Pa. St. 151; *McFarland v. Washburn*, 14 Ill. App. 363.

3 *Fortman v. Rottler*, 8 Ohio St. 543; *Hall v. Fisher*, 20 Barb. 441; *Moulton v. Beecher*, 1 Abb. N. C. 133; *Clark v. Cleveland*, 6 Hill, 344; *Swartwout v. Dickelman*, 12 Hun, 353; *Dusenbury v. Kelley*, 8 Daly, 537.

4 *Anderson v. Buchanan*, Wright, 725; *Ferguson v. Tobey*, 1 Wash. T. 275; *Griffith v. Chubb*, 7 Tex. 603; 58 Am. Dec. 85, 93, n.; *Mooney v. Kennett*, 10 Mo. 551; 61 Am. Dec. 576, 580, n.; *Schoonover v. Reed*, 66 Ind. 598. See *Cochrane v. Quackenbush*, 29 Minn. 378; *McElroy v. Adams*, 32 Ark. 315; *Stancil v. Palmeto*, 18 Ind. 221; *Dennis v. Ryan*, 63 Barb. 143.

BOONE PLEAD. — 27.

- 5 *Scotten v. Longfellow*, 40 Ind. 21. And see *Hays v. Blizzard*, 30 Ind. 457.
- 6 *Van De Wiele v. Callanan*, 7 Daly, 336; *Ellis v. Thilman*, 3 Call, 3.
- 7 *Van De Wiele v. Callanan*, 7 Daly, 336.
- 8 *Ziegler v. Powell*, 54 Ind. 173.
- 9 *Ziegler v. Powell*, 54 Ind. 172.
- 10 *Garrison v. Pearce*, 3 Smith, E. D. 255; *Laird v. Taylor*, 66 Barb. 130; *Dusenbury v. Kelley*, 8 Daly, 537, 540.
- 11 *Merriman v. Morgan*, 7 Oreg. 63; *Fortman v. Rottler*, 8 Ohio St. 548; *Nebenzahl v. Townsend*, 61 How. Pr. 353, 359.
- 12 *Nebenzahl v. Townsend*, 61 How. Pr. 353; 10 Daly, 232.
- 13 *Moulton v. Beecher*, 1 Abb. N. C. 183. Compare *Thomason v. Demotte*, 18 How. Pr. 525; 9 Abb. Pr. 242; *Marbourg v. Smith*, 11 Kan. 554; *Kelley v. Sage*, 12 Kan. 109; *Ash v. Marlow*, 20 Ohio, 119.
- 14 *Searll v. McCracken*, 16 How. Pr. 262.
- 15 *Jennings v. Davidson*, 13 Hun, 483; *Miller v. Milligan*, 48 Barb. 30; *Turner v. Dinnegar*, 20 Hun, 466.
- 16 *Stanfield v. Phillips*, 78 Pa. St. 73; *Donnell v. Jones*, 13 Ala. 420; *Miles v. Weston*, 60 Ill. 361.
- 17 *Horne v. Sullivan*, 83 Ill. 30. And see *Donnell v. Jones*, 13 Ala. 490.
- 18 *Thompson v. Lumley*, 7 Daly, 74; *Strang v. Whitehead*, 12 Wend. 64. See *Ziegler v. Powell*, 54 Ind. 173, 178.
- 19 *Behinger v. Sweet*, 1 Abb. N. C. 263; 6 Hun, 478.
- 20 *Hazard v. Harding*, 63 How. Pr. 326. See *Smith v. Smith*, 20 Hun, 555.
- 21 *Diehl v. Friester*, 37 Ohio St. 473; *Spice v. Steinruck*, 14 Ohio St. 213; *Colter v. Lower*, 35 Ind. 285; *Carey v. Sheets*, 60 Ind. 17. But see *Hazard v. Harding*, 63 How. Pr. 326, 327; *Akin v. Newell*, 32 Ark. 605.
- 22 See *Eddy v. Beach*, 7 Abb. Pr. 17; *Molony v. Dows*, 2 Hilt. 247; 16 How. Pr. 281; *Gallimore v. Ammerman*, 30 Ind. 323; *Painter v. Ives*, 4 Neb. 22; *Shaw v. Jayne*, 4 How. Pr. 119; *Dusenbury v. Kiely*, 8 Daly, 537.
- 23 *Barr v. Shaw*, 10 Hun, 590; *Bradner v. Faulkner*, 93 N. Y. 515; *Marks v. Townsend*, 21 N. Y. Week. Dig. 10. But see *Nebenzahl v. Townsend*, 10 Daly, 232; 61 How. Pr. 353.
- 24 *Painter v. Ives*, 4 Neb. 122; *Spice v. Steinruck*, 14 Ohio St. 213.
- 25 *Johnson v. Corrington*, 3 Clin. Bull. 1130. And see *Steel v. Williams*, 18 Ind. 181; *Truesdell v. Combs*, 33 Ohio St. 186.
- 26 *Wagstaff v. Schippel*, 27 Kan. 450. That there can be no recovery for false imprisonment on proof of a case of malicious prosecution. See *Hersog v. Graham*, 9 Lea, 152. And that where a complaint sets forth a cause of action for false imprisonment, and another for malicious prosecution, both for the same arrest and imprisonment, the plaintiff should be required to elect between them at the trial. See *Nebenzahl v. Townsend*, 10 Daly, 232; 61 How. Pr. 353.
- 27 *Blitz v. Meyer*, 40 N. J. L. 253; 29 Am. Rep. 233; *Eberly v. Rupp*, 90 Pa. St. 259; *Meyer v. Walter*, 64 Pa. St. 289; *Gorton v. Brown*, 27 Ill. 483; *Wetmore v. Mellinger*, Sup. Ct. Iowa, 15 N. W. Rep. 870. Compare *Moffatt v. Fisher*, 47 Iowa, 473; *Green v. Cochran*, 43 Iowa, 54; *Sutton v. McConnell*, 46 Wis. 269, 279.

§ 168. **Malicious prosecution — Answer.** — In an action for malicious prosecution, the defendant may allege in mitigation facts tending to show that what he did was done without malice, and that he had a right to suppose there was reasonable cause for his action.¹ And facts showing probable cause may be given in evidence under the general denial;² though, according to some of the decisions, the particular grounds showing probable cause should be set up in the answer.³ But the defendant may, under a general denial, show that he acted upon the advice of counsel learned in the law, and upon a full presentation of the facts, and this would be an effectual defense;⁴ otherwise, that he acted upon the advice of a justice of the peace not learned in the law.⁵ In order to constitute a defense to an action for malicious prosecution, the facts stated in the complaint, if they do not constitute a crime, must nevertheless be true,⁶ since it is impossible for a party to make for himself probable cause out of his own falsehood.⁷

1 *Bradner v. Faulkner*, 93 N. Y. 515; 18 N. Y. Week. Dig. 134.

2 *Trogden v. Deckard*, 45 Ind. 572; *Benedict v. Seymour*, 6 How. Pr. 298. And see *John v. Bridgman*, 27 Ohio St. 22.

3 *Brown v. Connelly*, 5 Blackf. 390; *Scheer v. Keown*, 34 Wis. 349; *Wilson v. Ferrari*, 1 Dian. 579.

4 *Smith v. Davis*, 3 Mont. 109; *Levy v. Brannan*, 39 Cal. 485; *Sparling v. Conway*, 6 Mo. App. 293; *Hall v. Suydam*, 6 Barb. 83; *White v. Tucker*, 16 Ohio St. 468; *Wright v. Hanna*, 98 Ind. 217. See *Watt v. Corey*, 76 Me. 87.

5 *Dolbe v. Norton*, 22 Kan. 101; *Sutton v. McConnell*, 46 Wis. 269; *Coleman v. Henrich*, 2 Mackey, 189. But compare *Hahn v. Schmidt*, 64 Cal. 284; *McNeely v. Driskill*, 2 Blackf. 259; *Leigh v. Webb*, 3 Esp. 164.

6 *Anderson v. Buchanan*, 8 Ind. 432; *Dennis v. Ryan*, 63 Barb. 145; *Hahn v. Schmidt*, 64 Cal. 284; *Farlie v. Danks*, 30 Eng. L. & Eq. 115.

7 *Dennis v. Ryan*, 63 Barb. 145. One sued for malicious prosecution cannot be heard to contend that the complaint upon which he procured the arrest to be made was defective: *Parll v. Reed*, 30 Kan. 534.

§ 168 a. **Mandamus.** — Although the remedy by mandamus is prosecuted in the name of the State upon

individual relation or information, yet the proceeding is declared by the courts to be a civil remedy, having all the qualities and attributes of a civil action, and is applied solely for the protection of civil rights.¹ Nor is it necessary in order to maintain mandamus to enforce a public right, that the relator should show that he has any legal or special interest in the result, beyond his interest as a citizen, in having the laws executed and the right enforced;² though, according to the decisions in some of the States, he must show that he has some private or special interest to be subserved, or some particular right to be pursued or protected, independent of that which he holds in common with the public at large.³ And he must affirmatively show performance of whatever is required of him as a condition precedent to the right demanded, before he is entitled to the writ.⁴ The alternative writ of mandamus, and the return thereto, are usually regarded as constituting the pleadings in proceedings by mandamus, the writ standing in the place of the complaint, and the return taking the place of the plea or answer in an ordinary action at law.⁵ The alternative writ, when issued, becomes and constitutes the plaintiff's complaint or cause of action, and upon it, issues of law or fact may be joined as upon the complaint in other cases.⁶ And the relator should so set forth the facts upon which he relies for the relief sought that the defendant may be able to take issue on them.⁷ He is bound to state a case *prima facie* good,⁸ and the same sufficiency of statement is required as in a complaint in an ordinary action.⁹ The alternative writ, as a pleading, should be entitled, showing who are the parties to the action, making the relator the plaintiff, and the respondent the defendant.¹⁰ It must show on its face a clear right to the relief demanded by the relator,¹¹ and should con-

tain no allegations except such as are pertinent to that right.¹² A motion to quash, for a want of statement of facts sufficient to entitle the relator to the relief sought, is equivalent to a demurrer to a complaint or petition in an ordinary action.¹³ A plea which takes issue upon immaterial facts, but which does not traverse and deny nor confess and avoid the material allegations, is bad upon demurrer.¹⁴ Generally speaking, the pleadings are to be construed and to have the same effect as pleadings in a civil action.¹⁵ The relation is to be regarded the same as a complaint, and the return as an answer, to which a demurrer or reply may be interposed.¹⁶ And the pleadings may be amended as in civil actions.¹⁷

1 See *Judd v. Driver*, 1 Kan. 455; *McBane v. People*, 50 Ill. 508; *Byers v. Bailey*, 7 Iowa, 531; *Arberry v. Beavers*, 6 Tex. 457; 55 Am. Dec. 791; *State v. Gracey*, 11 Nev. 223; *Weber v. Zimmerman*, 23 Md. 45.

2 *Hamilton v. State*, 3 Ind. 452; *State v. Gracey*, 11 Nev. 223; *State v. Doyle*, 40 Wis. 175; *People v. Halsey*, 37 N. Y. 344; *State v. Board of Education*, 35 Ohio St. 363; *Moses v. Kearney*, 31 Ark. 261; *Hall v. People*, 57 Ill. 307; *State v. Shropshire*, 4 Neb. 411; *Pumphrey v. Mayor etc.* 47 Md. 145; *McConihe v. State*, 17 Fla. 238.

3 *Linden v. Alameda Co.* 45 Cal. 6; *Adkins v. Doolen*, 23 Kan. 659; *Robbett v. State*, 10 Kan. 9; *Heffner v. Commonw.* 23 Pa. St. 108; *Sanger v. County Commissioners*, 25 Me. 291.

4 *People v. Glann*, 70 Ill. 232; *People v. Hayt*, 66 N. Y. 606.

5 *State v. Gracey*, 11 Nev. 223; *Smith v. Johnson*, 69 Ind. 55; *People v. Ovenshire*, 41 How. Pr. 164. And see *People v. Mayor etc.* 51 Ill. 25; *State v. Sheridan*, 43 N. J. L. 82; Cal. Code Civ. Proc. § 1089.

6 *Jessup v. Carey*, 61 Ind. 584; *Johnson v. Smith*, 64 Ind. 275; *Smith v. Johnson*, 69 Ind. 55. And see *Fornoff v. Nash*, 23 Ohio St. 335; *Jones v. Gibbs*, 51 Miss. 401; *Beard v. Supervisors*, 51 Miss. 542; *People v. Salomon*, 46 Ill. 336.

7 *People v. Supervisors*, 15 Barb. 607; *State v. Everett*, 52 Mo. 83; *Lavalle v. Soucy*, 86 Ill. 467.

8 *State v. Helmer*, 10 Neb. 23; *People v. Hatch*, 33 Ill. 133; *State v. Governor*, 39 Mo. 383.

9 *People v. Ransom*, 2 N. Y. 400. And see *Arberry v. Beavers*, 6 Tex. 457; 55 Am. Dec. 791.

10 *State v. Commissioners etc.*, 11 Kan. 66, 71.

11 *People v. Glann*, 70 Ill. 232; *Board of Trustees v. People*, 12 Ill. 248; 52 Am. Dec. 488; *People v. Davis*, 94 Ill. 133; *People v. Ovenshire*, 41 How. Pr. 164; *Fairbank v. Sheridan*, 43 N. J. L. 82.

12 *People v. Ovenshire*, 41 How. Pr. 164. See *People v. Supervisors*, 12 Barb. 446; *People v. Supervisors*, 15 Barb. 607.

13 *State v. Stockwell*, 7 Kan. 96; *Crans v. Francis*, 24 Kan. 750. See *Potts v. State*, 75 Ind. 336; *Fornoff v. Nash*, 23 Ohio St. 335; *People v. Railroad Co.* 23 Hun, 543; 3 Civ. Proc. R. 11.

14 *State v. Eaton*, 11 Wis. 29.

15 *Crans v. Francis*, 24 Kan. 750; *State v. Jennings*, 56 Wis. 113.

16 *State v. Jennings*, 56 Wis. 113. See *People v. Supervisors*, 32 Barb. 473; *People v. Schuyler*, 51 How. Pr. 461; *People v. Supervisors*, 70 N. Y. 223; *People v. Baker*, 35 Barb. 104; 14 Abb. Pr. 19; *People v. Board of Assessors*, 7 Hun, 223; *People v. Supervisors*, 14 Barb. 52; *Fornoff v. Nash*, 23 Ohio St. 335.

17 *Fornoff v. Nash*, 23 Ohio St. 335; *Bloxham v. Gibbs*, 13 Fla. 55; *United States v. Union Pac. Railw. Co.* 4 Dill. 479; *People v. Baker*, 35 Barb. 103; 14 Abb. Pr. 19.

‡ 169. **Master and servant.**—An allegation in the complaint that the plaintiff was in the employ of the defendant, sufficiently alleges that the relation of master and servant existed between the parties;¹ but no special contract between them is to be inferred from such an allegation.² To entitle a servant to recover of the master, for an injury to the former happening to him in the course of his service, through the use of defective machinery or tools, he must prove notice to the master of the defects, and in order to be able to prove notice he must allege it in his complaint.³ The complaint should allege that the defect was unknown to the plaintiff, and that it was known to the defendant, or that, but for the want of proper care and diligence, it would have been known.⁴ Though, according to some of the decisions, if the existence of the defect were really unknown, but should have been known, the fact that the servant had equal means of knowledge is a matter of defense, and need not be negatived by the complaint.⁵ The master cannot be held liable to a servant for an injury caused by the negligence of a fellow-servant;⁶ and in the absence of an averment that the master was negligent in employing or retaining such servant, the complaint does not sufficiently state a cause of action against the master.⁷ And an allegation that the master knew of the incompetency of

the delinquent servant is not supported by proof simply of an employment without reasonable inquiry as to fitness;⁸ employment without reasonable inquiry is a different issue from continuance in service after knowledge of incompetency, though they may be equal in their results so far as fixing the liability of the master or employer.⁹ In an action for a breach of contract of hiring, the issue being whether the plaintiff discharged his duties properly, testimony as to his competency, and as to his general fitness for the position for which he was employed, is inadmissible.¹⁰

1 *McMillan v. Saratoga etc. R. R. Co.* 20 Barb. 443.

2 *McMillan v. Saratoga etc. R. R. Co.* 20 Barb. 443.

3 *McMillan v. Saratoga etc. R. R. Co.* 20 Barb. 443; *Byron v. N. Y. State Printing etc. Co.* 28 Barb. 39; *Columbus etc. R. R. Co. v. Arnold*, 31 Ind. 174.

4 *Buzzell v. Laconia Manuf. Co.* 48 Me. 112. And see *Mad River etc. R. R. Co. v. Barber*, 5 Ohio St. 541; *Georgia R. R. etc. Co. v. Kenney*, 58 Ga. 485. Where the action was for a personal injury sustained by the plaintiff in blasting, a complaint alleging an undertaking on the part of the employer to furnish suitable powder, and a breach of that undertaking by furnishing mixed powder, a more hazardous article, the increased hazard being unknown to the plaintiff, whereby the explosion took place and the injury was sustained, was held to be sufficient in substance, without specifying what particular elements in the mixture rendered it less safe than suitable powder would have been: *Eagle etc. Manuf. Co. v. Welch*, 61 Ga. 444. And see *Spelman v. Fisher Iron Co.* 56 Barb. 151.

5 *Cummings v. Collins*, 61 Mo. 520; *Ind. etc. R. R. Co. v. Klein*, 11 Ind. 38.

6 *Slattery v. Railroad Co.* 23 Ind. 81; *Brazil etc. Coal Co. v. Cain*, 98 Ind. 282; *Hubgh v. Railroad Co.* 6 La. An. 495; 54 Am. Dec. 565; *Sullivan v. Railroad Co.* 58 Ind. 28; *Murray v. Railroad Co.* 1 McMull. 385; 36 Am. Dec. 283; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Willis v. Oreg. Ry. & Nav. Co.* Sup. Ct. Oreg. 4 Pacif. L. Rep. 121.

7 *Slattery v. Railroad Co.* 23 Ind. 81; *Collier v. Steinhart*, 51 Cal. 116; *Dow v. Kan. Pacif. Railw.* 8 Kan. 642. See *Flike v. Railroad Co.* 53 N. Y. 549; 13 Am. Rep. 545; *Brothers v. Cartter*, 52 Mo. 372; 14 Am. Rep. 424.

8 *Union Pacif. Railw. v. Young*, 8 Kan. 638.

9 *Union Pacif. Railw. v. Young*, 8 Kan. 638.

10 *Stone v. Vimont*, 7 Mo. App. 277.

§ 170. **Mistake.**—A mere mistake in stating the date of the facts constituting the plaintiff's cause of action, which is palpably a clerical error, will not render the

complaint bad on demurrer, if it be otherwise good.¹ A complaint in an action to recover special damages for loss caused by the incorrect transmission of a telegram, which avers facts showing that the loss could not have been caused by the error, is bad after verdict.² Where a complaint alleges mistake, and asks relief on that ground alone, it should point out the mistake and show in terms what the tenor of the instrument ought to be;³ and it is not sufficient to say that it was the intention of the parties to make an instrument that would accomplish a certain object, and then ask the court to make a writing that will accomplish that object.⁴ Though if the complaint sets forth facts showing that the parties were mistaken, it is sufficient, although there is no direct allegation of mistake.⁵ In an action to have a written contract reformed, on the ground of mistake, the complaint must show that the alleged mistake was that of the parties to the contract, and that it was mutual;⁶ otherwise the court will not, as a rule, correct such mistake by the reformation of such instrument.⁷ And proof of the mistake and that it was mutual must be very clear.⁸ Where the complaint alleges mistake, and asks relief on that ground alone, the court will not reform the instrument on the ground that one of the parties to it was guilty of a fraud in its execution.⁹ Nor can mere mistake be proved under an averment of fraud.¹⁰ Knowledge of fraud or error in an account by the party to whom it has been presented, although the account has become a stated account by the mere failure of the party receiving it to object within a reasonable time, does not prevent or estop such party from afterwards setting up the fraud or error as a defense to an action on the account;¹¹ but the burden of proof is upon the party disputing the account to show its incorrectness.¹²

- 1 *Orr v. Miller*, 98 Ind. 436.
- 2 *West. Union Tel. Co. v. Reed*, 96 Ind. 195.
- 3 *Stephens v. Murton*, 6 Oreg. 193; *Durham v. Insurance Co. Cir. Ct. Oreg.* 5 West C. Rep. 129; *Finch v. Hollinger*, 47 Iowa, 173. And see *Burley v. Weller*, 14 W. Va. 264.
- 4 *Stephens v. Murton*, 6 Oreg. 193. And see *Nelson v. Davis*, 40 Ind. 366; *Allen v. Anderson*, 44 Ind. 395; *Nicholson v. Caress*, 59 Ind. 39.
- 5 *Welles v. Yates*, 44 N. Y. 525; *Pitcher v. Hennessy*, 48 N. Y. 415; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283.
- 6 *Evarts v. Steger*, 5 Oreg. 147; *Nevins v. Dunlap*, 33 N. Y. 676; *Durham v. Insurance Co. Cir. Ct. Oreg.* 5 West C. Rep. 129; *Schoonover v. Dougherty*, 65 Ind. 463. And see *Lewis v. Cavanagh*, 14 N. Y. Week. Dig. 535.
- 7 *Schoonover v. Dougherty*, 65 Ind. 463; *Barnes v. Bartlett*, 47 Ind. 98.
- 8 *Stephens v. Murton*, 6 Oreg. 193; *Smith v. Butler*, 11 Oreg. 46; *Smith v. Knapp*, 18 N. Y. Week. Dig. 95; *Allen v. Anderson*, 44 Ind. 395.
- 9 *Stephens v. Murton*, 6 Oreg. 193. And see *McMichael v. Kilmer*, 76 N. Y. 36; *Dudley v. Scranton*, 57 N. Y. 424. But compare *Montgomery v. Shockey*, 37 Iowa, 107.
- 10 *Leighton v. Grant*, 20 Minn. 345.
- 11 *Baxter v. Lockett*, Sup. Ct. Wash. T. 6 West C. Rep. 119.
- 12 *Baxter v. Lockett*, Sup. Ct. Wash. T. 6 West C. Rep. 119.

§ 171. **Money had and received, etc.**—The action for money had and received may be maintained whenever an equity arises from the circumstance that one man has money which he ought to pay to another.¹ In such case, the law raises a promise on the part of the receiver of the money that he will pay it, and that, too, without any previous request.² A form of complaint in substance like the former common count in *assumpsit*, alleging money had and received by the defendant to and for the use of the plaintiff, is good, at least against demurrer.³ Under such general allegation, any special circumstance which creates the liability may be proved.⁴ But the complaint may set forth the special circumstances which create the liability, in which case the plaintiff is confined to proof of the special circumstances alleged.⁵ It is usual in this action to allege a request or demand for the payment of the money, but

such an allegation is held not to be essential to the sufficiency of the complaint.⁶ A complaint merely alleging that the defendant, without any consideration therefor, did obtain the money from the plaintiff, is not equivalent to stating that the money was received for the use of the plaintiff, and is insufficient.⁷ A cause of action for money had and received by an agent or attorney in a fiduciary capacity, which money he had neglected and refused to pay over on demand, is, in form, a cause of action *ex contractu*;⁸ and proof that the defendant has received money to which the plaintiff is equitably entitled is sufficient to sustain the action, and an allegation that the defendant received the money in a fiduciary capacity is not essential to entitle the plaintiff to recover, and need not be proved.⁹ In an action for money had and received to the plaintiff's use, all equitable defenses are available.¹⁰ To sustain an action for money paid by the plaintiff to the use of the defendant at the latter's special instance and request, it must appear that the defendant was bound to pay in the first instance, and that the claim paid was one for the satisfaction of which the defendant's property could be lawfully taken, without any fault or negligence on his part.¹¹ Money voluntarily paid for another, without his request, express or implied, cannot be recovered.¹² And a complaint stating merely that the plaintiff was compelled to and did pay under protest and by compulsion, and not voluntarily, does not sufficiently state a case of duress, or such a compulsory payment as is required to allow a recovery of the money paid;¹³ the facts must be so stated that the court may see that the payment was compelled by duress.¹⁴ If a complaint contains sufficient allegations to constitute a cause of action for the recovery of money paid, on the ground of an entire failure of con-

sideration, all the other allegations may be disregarded, and a recovery may be had on that ground if the evidence warrants it.¹⁵ The complaint in an action to recover back money lost at play must be special, showing the facts bringing the case within the statute, which alone gives the right of recovery.¹⁶ Such complaint should aver that the money was lost and was paid or delivered to the defendant, or should otherwise show that the money was actually received by him.¹⁷ In an action for money loaned, if the answer simply alleges payment and failure of consideration, evidence that after the loan the plaintiff induced the defendant, by false representations, to part with the money, is inadmissible.¹⁸ A complaint for money had by the defendant of the plaintiff, to the defendant's use, is not sustained by proof of a demand against the defendant, in favor of a third person, assigned to the plaintiff.¹⁹

1 *Quimby v. Lyon*, 63 Cal. 394; *McFadden v. Wilson*, 96 Ind. 253; *Bahnon v. Clemmons*, 79 N. C. 556; *Beardsley v. Root*, 11 Johns. 464; 6 Am. Dec. 386; *Eddy v. Smith*, 13 Wend. 488; *Tutt v. Ide*, 3 Blatchf. 249; *Peterson v. Foss*, Sup. Ct. Oreg.; 6 West C. Rep. 147. And privity of contract between the parties is not necessary to sustain the action for money had and received: *Kreutz v. Livingston*, 15 Cal. 344; *Ela v. Express Co.* 29 Wis. 611.

2 *Hawley v. Sage*, 15 Conn. 56; *McFadden v. Wilson*, 96 Ind. 253, 258.

3 *Abadie v. Carrillo*, 32 Cal. 174; *Allen v. Patterson*, 7 N. Y. 476; *Grannis v. Hooker*, 29 Wis. 65; *Continental Life Ins. Co. v. Houser*, 89 Ind. 258; *McNutt v. Kaufman*, 26 Ohio St. 127; *American Nat. Bank v. Wheelock*, 13 Jones & S. 205; *Terrell v. Butterfield*, 92 Ind. 1.

4 *American Nat. Bank v. Wheelock*, 13 Jones & S. 205.

5 *American Nat. Bank v. Wheelock*, 13 Jones & S. 205.

6 *Quimby v. Lyon*, 63 Cal. 394. See *Reina v. Cross*, 6 Cal. 30; *Campbell v. Jones*, 38 Cal. 507; *Stanwood v. Sage*, 22 Cal. 517; *Grannis v. Hooker*, 29 Wis. 65; *City of Paris v. Hunter*, 10 Ill. App. 230; *Koons v. Williamson*, 90 Ind. 599.

7 *American Nat. Bank v. Wheelock*, 13 Jones & S. 205.

8 *Segelken v. Meyer*, 94 N. Y. 473.

9 *Segelken v. Meyer*, 94 N. Y. 473; *Greentree v. Rosenstock*, 61 N. Y. 583; *Conaughty v. Nichols*, 42 N. Y. 83; *Tugman v. Nat. Steamship Co.* 76 N. Y. 207.

10 *Sahler v. Williams*, 17 N. Y. Week. Dig. 80.

11 *Moffat v. Henderson*, 13 Jones & S. 211, 213.

12 *Wilkes v. Mayor etc.* 70 N. Y. 621; *Ingraham v. Gilbert*, 20 Barb. 151; *Montgomery v. Gibbs*, 40 Iowa, 652; *Oden v. Elliott*, 10 Mon. B. 313. See *Surdan v. Fuller*, 31 Hun, 500.

13 *Commercial Bank v. City of Rochester*, 41 Barb. 341. And see *S. C.* again, 42 Barb. 483.

14 *Commercial Bank v. City of Rochester*, 41 Barb. 341.

15 *Sheppard v. Earle*, 25 Hun, 317.

16 *Moran v. Morrissey*, 28 How. Pr. 100; 13 Abb. Pr. 121.

17 *Stannard v. Eytinge*, 33 How. Pr. 262; 3 Abb. Pr. N. S. 42; 5 Robt. 50. Compare *Lear v. McMillen*, 17 Ohio St. 464; *Betts v. Bache*, 23 How. Pr. 197; 9 Bosw. 614; 14 Abb. Pr. 279.

18 *Wallace v. Kingon*, 13 N. Y. Week. Dig. 62.

19 *Decker v. Saltzman*, 1 Hun. 421; 3 Thomp. & C. 539. An answer may join in the same count, by way of counter-claim, demands for goods, wares, and merchandise sold and delivered, for money laid out and expended, and for money had and received: *Clay v. Carroll*, Sup. Ct. Cal. 6 West C. Rep. 423.

§ 172. **Municipal corporation—Complaint.**—The description in the complaint or petition of the defendant, as a city, is a sufficient averment of the fact that it is a municipal corporation.¹ The courts of a State take judicial notice of the incorporation of a city of the State, and a complaint against such city need not aver its corporate character.² But this rule is held to apply only to a city or town incorporated by special act,³ and that when it is incorporated under a general act, the fact of its corporate character must be pleaded and proved.⁴ A complaint averring that the defendant is a municipal corporation under the laws of New York, naming its territorial location and the residence of its officers, and charging neglect of duty and consequential injury to the plaintiff's property, is good.⁵ In an action against a village for injuries caused by a defective sidewalk, it need not be alleged that such village was organized under or by virtue of any particular act, and an allegation that it was organized under an act which was void does not prevent the court from inquiring whether the village does not in fact exist under some valid law of the State.⁶ So where a complaint designates the plaintiff therein as "the board of school trustees for the

town of," etc., such designation implies that the plaintiff is a corporation, and the complaint is sufficient on demurrer thereto for want of legal capacity to sue.⁷ Since courts take judicial notice of the charters or laws under which cities are incorporated, it is not necessary to allege, in an action for injury from defect in a street, the power possessed by the city over its streets.⁸ But in order to hold a municipal corporation liable for negligently failing to repair a street, or remove an obstruction therefrom, it must have notice of the want of repair or the existence of the obstruction, and notice must either be averred in the complaint, or facts stated from which it can be reasonably inferred.⁹ And a complaint against an incorporated town for an injury resulting from a defective sidewalk, which fails to aver notice by the corporation of the defect, or facts by reason of which the law will impute notice, or from which it may be reasonably inferred, is bad on demurrer.¹⁰ Where the right of action against a county is by statute made to depend upon the fact that the claim, demand, or right of action has first been presented to the county court, etc., and has been disallowed, this fact must be stated in the complaint, and without such statement the complaint fails to state a cause of action against a county.¹¹ In an action against a city for negligently changing the grade of a street, an allegation that the city "raised the grade" is equivalent to an allegation that the grade was raised in pursuance of an ordinance, since the city could only act in such matters by ordinance.¹² So an averment that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied, and is sufficient to authorize the reception of the ordinance in evidence.¹³ But an averment that the plaintiff was entitled to the use of a "public alley" is not supported by proof of a right to use a private

ally.¹⁴ An allegation in a complaint on a special tax-bill, that the contract for street improvement, under which it was issued, was "duly awarded" by certain officers having the power of awarding contracts for public works, is sufficient, and dispenses with the necessity of stating the facts which authorized them to make the award.¹⁵ It is said that no fixed rule can be laid down which will embrace every character of tort for which a municipal corporation is liable, and all that can be done with safety is to determine each case on its own facts as it arises;¹⁶ and it is the duty of the pleader to set forth the special facts on which the liability in the particular case is claimed.¹⁷ Such corporation has no right to construct a ditch in a manner to collect surface water into a channel and pour it upon lands where it is not accustomed to run, and in a complaint for such injury it is not necessary to aver that the plaintiff was without fault;¹⁸ an averment that the plaintiff was without fault is not necessary in a case of trespass, but only where the issue is solely a question of negligence.¹⁹ An action in form for money had and received is maintainable against a town, to recover money of another wrongfully taken by it, and applied to its own use.²⁰ To state a cause of action against a school district for money "paid, laid out, and expended" for its use, and at its request, facts must be averred which show that the supposed indebtedness was such as the district could lawfully incur.²¹ And a complaint on a contract by a town for building a bridge, which does not aver that the contract was executed by legislative authority, is insufficient.²²

1 O'Donald v. Evansville R. R. Co. 14 Ind. 259; Stier v. Oskaloosa, 41 Iowa, 353. See Bolton v. Cleveland, 35 Ohio St. 319.

2 Smith v. City of Janesville, 52 Wis. 680. And see Stultz v. State, 65 Ind. 492; People v. Potter, 35 Cal. 110; Case v. Mayor etc. 30 Ala. 533.

3 Prell v. McDonald, 7 Kan. 436; Sipe v. Holaday, 62 Ind. 4; Fauntleroy v. Hannibal, 1 Bill. 118; Hard v. City of Decorah, 43 Iowa, 313.

- 4 *Hard v. City of Decorah*, 43 Iowa, 313.
- 5 *Harvey v. Village of Little Falls*, 19 N. Y. Week. Dig. 48.
- 6 *Cole v. President and Trustees etc.* 57 Wis. 110.
- 7 *Mackenzie v. Board of School Trustees*, 72 Ind. 189. And see *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Northwestern Conference v. Myers*, 36 Ind. 375.
- 8 *Stier v. City of Oskaloosa*, 41 Iowa, 353; *Haire v. City of Kansas*, 76 Mo. 438.
- 9 *Mack v. City of Salem*, 6 Oreg. 275; *Turner v. City of Indianapolis*, 96 Ind. 51; *Barnes v. Town of Newton*, 46 Iowa, 567; *Barstow v. Berlin*, 34 Wis. 357.
- 10 *Town of Spiceland v. Aller*, 98 Ind. 467; *Town of Elkhart v. Ritter*, 66 Ind. 136. Compare *Board etc. v. Brown*, 89 Ind. 48; *Board etc. v. Bacon*, 96 Ind. 31.
- 11 *Fenton v. Salt Lake County*, 3 Utah, 423; 3 West C. Rep. 263; *Rhoda v. Alameda County*, 52 Cal. 359; *Schroeder v. Colbert County*, 66 Ala. 137. And see *Yolo County v. Sacramento*, 36 Cal. 193; *Ernst v. Kunkle*, 5 Ohio St. 523; *City of Atchison v. King*, 9 Kan. 550; *Jaquish v. Town of Ithaca*, 36 Wis. 108; *Collins v. King County*, 1 Wash. T. 416; *Chicago etc. Railw. Co. v. Town of Langlade*, 55 Wis. 116. In an action *ex delicto* against a city, it is not necessary to allege in the complaint that the claim has been presented to the common council for audit, as required by the city charter: *Nagle v. City of Buffalo*, 20 N. Y. Week. Dig. 214.
- 12 *Werth v. City of Springfield*, 78 Mo. 107. And see *Foster v. City of St. Louis*, 71 Mo. 157; *Wegmann v. City of Jefferson*, 61 Mo. 55.
- 13 *City of Kansas v. Johnson*, 78 Mo. 661.
- 14 *Satchell v. Doran*, 4 Ohio St. 542.
- 15 *Culligan v. Studebaker*, 67 Mo. 372.
- 16 See *Richmond v. Long*, 17 Gratt. 375; *Lloyd v. Mayor etc.* 5 N. Y. 369; *Hill v. Boston*, 122 Mass. 344.
- 17 *Conway v. City of Beaumont*, 61 Tex. 10.
- 18 *City of North Vernon v. Voegler*, 89 Ind. 77. And see *Weis v. City of Madison*, 75 Ind. 241; 39 Am. Rep. 135.
- 19 *Roll v. City of Indianapolis*, 52 Ind. 547. And see *Murphy v. City of Indianapolis*, 83 Ind. 76. The rule that a master is not liable to a servant for an injury resulting from the negligence of a fellow servant is not applicable to a suit against a municipal corporation: *Turner v. Indianapolis*, 96 Ind. 51.
- 20 *Horn v. Town of New Lots*, 83 N. Y. 100. And see *Hathaway v. Cincinnati*, 62 N. Y. 434. A town must be sued by its corporate name, not in the name of its officers: *Young v. Barden*, 90 N. C. 424. But it was held that town supervisors, and not the town, are properly made parties defendant to a proceeding to enjoin the illegal removal of a fence from the plaintiff's land: *Uren v. Walsh*, 57 Wis. 96.
- 21 *School District No. 16 v. School District No. 9*, 12 Neb. 241.
- 22 *Donnelly v. Town of Ossining*, 18 Hun, 352. Where materials supplied to a municipal corporation for a public work are required by law to be furnished by contract made on advertisement for bids, recovery therefor must be upon such a contract, and cannot be had on the ground of *quantum meruit*: *Bigler v. Mayor etc.* 5 Abb. N. C. 51.

§ 173. **Municipal corporation — Answer.** — The objection that a claim or demand has never been presented to the common council for allowance before bringing an action thereon, as required by the city charter, must be taken by demurrer or answer, otherwise it is waived.¹ Where, in an action against a municipal corporation, the proper officers answer for it, the answer, though informal, must be taken as that of the defendant.² Where a contract, alleged to have been made by a city, was executed by its mayor, the plea of *non est factum* need not be sworn to by the mayor;³ in such a case, where the act of the mayor is questioned, the plea is properly sworn to by members of the common council, and an affidavit made by them to the best of their knowledge and belief is sufficient.⁴ In an action by a board of county commissioners upon a promissory note, and to foreclose a mortgage on real estate given to secure the payment of the note, both executed to the plaintiff, an answer by the mortgagor alleging that the consideration for the note was an illegal, unauthorized loan to him, by the plaintiff, of a sum of money belonging to the "court-house fund" of such county, is insufficient.⁵ That a city assessment was vacated on *certiorari* before it could be collected is a sufficient answer to an allegation of want of due diligence in collecting it.⁶

1 Sheel v. City of Appleton, 49 Wis. 125.

2 School District v. Carson, 10 Kan. 238.

3 Hitchcock v. City of Galveston, 3 Woods, 287.

4 Hitchcock v. City of Galveston, 3 Woods, 287.

5 Sturgeon v. Board of Commissioners, 65 Ind. 302.

6 Flemming v. Hoboken, 40 N. J. L. 270. And see Knapp v. Hoboken, 39 N. J. L. 394.

§ 174. **Negligence — Complaint.** — In an action founded upon negligence, it is not necessary for the plaintiff, in his complaint or petition, to set out the facts constitut-

ing the negligence,¹ nor need the degree of negligence be averred.² An allegation specifying the act, the doing of which caused the injury, and averring generally that it was negligently and carelessly done, states a cause of action, although it be not apparent from the complaint how the injury resulted from the negligence alleged.³ Or if the facts stated show negligence, this is sufficient without alleging that the act was negligently done.⁴ And where negligence is averred in general terms, without stating the specific facts constituting it, objections that such averment is defective or uncertain cannot be made or presented by a demurrer for the want of sufficient facts, but only by a motion to make more specific.⁵ In an action against a corporation by one of its employees for damages for injuries sustained by reason of the negligence of the corporation, an allegation that charges the negligence to be that of the defendant is sufficient.⁶ Where the action was against a railroad company, and the complaint alleged that the obstruction on the track which caused the injury complained of was on the track by the negligence of the company, and that the deceased was at the time in the discharge of his duty, it was held that a demurrer would not lie.⁷ In an action against a telegraph company for negligently failing to deliver messages, general allegations in the complaint of a vague and indefinite character as to the employment of an incompetent operator by the company, when disconnected with any specific statement of facts showing acts of negligence resulting in loss, will not be deemed sufficient to support a claim for exemplary damages.⁸ Allegations of malice in actions for negligence are not necessary, and will be treated as surplusage.⁹ So, according to many decisions, what is known as "contributory negligence" is a defense, and in an action to recover damages for

negligence, the plaintiff need not aver in his complaint that his own negligence did not contribute to the result.¹⁰ But according to other decisions, such averment is a part of the plaintiff's case, and a complaint for negligence, which does not show the absence of negligence by the plaintiff contributing to the injury, is held bad on demurrer.¹¹ Thus, in an action against a railroad company for damages to the plaintiff's property caused by fire escaping from the defendant's locomotives, it is held that the complaint should not only allege negligence on the part of the defendant, but also that the plaintiff was without negligence.¹² But an averment in a complaint, that the plaintiff was without any fault, sufficiently negatives contributory negligence on his part, unless it clearly appears otherwise from the specific facts stated.¹³ And in a complaint for an injury not resulting from negligence, it is not necessary to aver that there was no negligence by the plaintiff.¹⁴ In Ohio, it is not necessary to allege in the petition that the injury was caused without the fault or negligence of the plaintiff, unless the other averments necessary to state a cause of action suggest the inference that the plaintiff may have been guilty of contributory negligence.¹⁵ When, in an action for damages for injuries received, the complaint shows that the proximate cause of the injury was the plaintiff's own act, it further devolves upon him to allege and prove that in thus acting he exercised that degree of care and prudence that a reasonable person would have used in like circumstances;¹⁶ in other words, that he was not guilty of contributory negligence.¹⁷ A complaint in an action against an attorney, to recover damages resulting from the ignorance and negligence of the attorney, need not show that the plaintiff was without fault.¹⁸ In an action against a county for negligently failing to

keep a bridge on a county road in a safe condition for use, the complaint must show that the bridge is one over which the county has control.¹⁹ In New York, in an action against a town for injuries caused by the negligence of its agents and servants in failing to repair a highway or bridge, the complaint must allege that the defendant had funds, or the means of acquiring funds, or that its highway commissioners had funds, or means of acquiring them.²⁰ A contract with a municipal corporation for repairing street lamp posts, and lighting the lamps, raises a public duty on the part of the contractor to be performed for the benefit of the citizens distributively; ²¹ and a recovery may be had by one who has been injured by reason of the negligent non-performance of such duty, in an action which proceeds, as for a non-performance of public duty, and which sets up the contract by way of inducement.²² In an action against a city for an injury caused by a defective sidewalk, a complaint averring that the plaintiff was without fault or negligence need not aver his ignorance of the defect.²³ But a complaint against a town to recover for a personal injury, in consequence of falling into an excavation in a street, which fails to show that the town was chargeable with fault at the time of the injury, or that the injury was caused by the wrongful act or omission of the town, is bad on demurrer.²⁴ In pleading, an allegation that an injury for which redress is sought was caused by the recklessness and gross negligence of the defendant, will not amount to a charge that the injury was inflicted purposely or willfully.²⁵ In New York, in an action to recover damages alleged to have been caused by the defendant's negligence, it is sufficient to aver in the complaint that the injury and damage complained of was caused by the negligence of the defendant, such averment being

equivalent to alleging that it was the sole cause.²⁶ And although the complaint does not specify a particular act of negligence, yet negligence in a form which appears by the defendant's evidence may be sufficient to sustain the action.²⁷ A complaint in an action for negligence causing death must state facts to show pecuniary loss, present or prospective, resulting from the death, to those entitled to the damages.²⁸ Where both actual and exemplary damages are claimed in an action for negligently causing death, they should be claimed by proper allegations, in the nature of distinct counts, on different causes of action.²⁹ Where alleged negligence consists in the omission of a duty, the facts relied on as implying the duty should be set forth in the pleading.³⁰

1 Mack v. Railroad Co. 77 Mo. 232; McCauly v. Davidson, 10 Minn. 418; Clark v. Railway Co. Cir. Ct. Iowa, 3 Colo. L. R. 343; Otto v. Railroad Co. 12 Mo. App. 163.

2 Nolton v. Railroad Co. 10 How. Pr. 97; 15 N. Y. 444.

3 Edens v. Railroad Co. 72 Mo. 213; Schneider v. R. R. Co. 73 Mo. 295; Johnson v. Railroad Co. 31 Minn. 233; Clark v. Railroad Co. 23 Minn. 69; Railroad Co. v. Chester, 57 Ind. 297; Kessler v. Leeds, 51 Ind. 212; Chiles v. Drake, 2 Met. (Ky.) 149. And see Railroad Co. v. Jones, 86 Ind. 496; 44 Am. Rep. 334; Brinkman v. Bender, 92 Ind. 234.

4 Dyer v. Pacific Railroad, 34 Mo. 127; Burdick v. Worrall, 4 Barb. 596. See Simpson v. La Plata etc. Co. Cir. Ct. Colo. 3 Colo. L. R. 563.

5 City of Evansville v. Worthington, 97 Ind. 282; Jones v. White, 90 Ind. 255. And see Cin. etc. R. R. Co. v. Chester, 57 Ind. 297; Ohio etc. R. R. Co. v. Collarn, 73 Ind. 261; 38 Am. Rep. 134; Nowlin v. Whipple, 79 Ind. 481; Tierney v. Railroad Co. 31 Minn. 234; Hayden v. Anderson, 17 Iowa, 162; Fitts v. Waldeck, 51 Wis. 569; Railroad Co. v. Lavally, 38 Ohio St. 225.

6 Cramer v. Union Pacif. Ry. Co. 3 Utah, 504. In a suit by one not a servant against a master to recover damages resulting from his servant's negligence, the complaint may impute the servant's negligence directly to the master: Haywood v. Hedrick, 94 Ind. 340; Railroad Co. v. Collarn, 73 Ind. 261; 38 Am. Rep. 134.

7 Wilson v. Railroad Co. 7 Colo. 101.

8 Daniel v. West Union Tel. Co. 61 Tex. 452. And see Hays v. Railroad Co. 46 Tex. 279.

9 Taylor v. Holman, 45 Mo. 371; McCord v. High, 24 Iowa, 328. See Conway v. Reed, 66 Mo. 346; Robinson v. Wheeler, 25 N. Y. 252.

10 Louisville etc. Canal Co. v. Murphy, 9 Bush, 522; Paducah etc. R. R. Co. v. Hoehli, 12 Bush, 41; Hackford v. Railroad Co. 6 Laus. 381;

83 N. Y. 634; *Lee v. Gaslight Co.* 20 N. Y. Week. Dig. 413; *Railway Co. v. Pointer*, 14 Kan. 37; *Robinson v. Railroad Co.* 48 Cal. 401; *Yik Hou v. Spring Valley Water Works*. Sup. Ct. Cal. 4 West C. Rep. 45; 4 Pacif. L. Rep. 686; *Conroy v. Oreg. Construction Co.* Cir. Ct. Oreg. 5 West C. Rep. 773; *Holmes v. Railroad Co.* 6 Sawy. 289; *Kuareborough v. Mining Co.* 3 Sawy. 446; *Railway Co. v. Gladmon*, 15 Wall. 401; *Robinson v. Railroad Co.* 65 Barb. 146; 66 N. Y. 11; 23 Am. Rep. 1; *Urquhart v. Ogdensburg*, 23 Hun. 75; *Hocum v. Weitherick*, 22 Minn. 152; *Lopez v. Mining Co.* 1 Ariz. 464.

11 *Louisville etc. Railroad Co. v. Lockridge*, 93 Ind. 191; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322. And see *Walsh v. Oreg. Ry. & Nav. Co.* 10 Oreg. 253; *Hale v. Smith*, 78 N. Y. 490.

12 *Wabash etc. R. R. Co. v. Johnson*, 96 Ind. 44. And see *Brinkman v. Bender*, 92 Ind. 224; *Railroad Co. v. Jones*, 86 Ind. 496; 44 Am. Rep. 334. But see *contra*, *Aycock v. Railroad Co.* 80 N. C. 321; *Owens v. Railroad Co.* 88 N. C. 502.

13 *Board of Commissioners v. Legg*, 93 Ind. 523; *Rogers v. Overton*, 87 Ind. 410; *Town of Rushville v. Poe*, 83 Ind. 83; *Gheens v. Golden*, 90 Ind. 427.

14 *Bowlus v. Brier*, 87 Ind. 391.

15 *Street Railroad Co. v. Nolthenius*, 40 Ohio St. 376. And see *Railroad Co. v. Barber*, 5 Ohio St. 541; *Robinson v. Gary*, 28 Ohio St. 241; *Railroad Co. v. Whitacre*, 35 Ohio St. 627; *Hays v. Gallagher*, 72 Pa. St. 140; *Tex. etc. R. R. Co. v. Murphy*, 46 Tex. 356; *Hoth v. Peters*, 55 Wis. 405.

16 *Kennon v. Glimmer*, 4 Mont. 433.

17 *Kennon v. Glimmer*, 4 Mont. 433.

18 *Jones v. White*, 90 Ind. 255.

19 *Board of Commissioners v. Legg*, 93 Ind. 523. And see *Board etc. v. Deprez*, 87 Ind. 509; *House v. Board etc.* 60 Ind. 580; 28 Am. Rep. 657; *State v. Board etc.* 80 Ind. 478; 41 Am. Rep. 821. Compare *Altow v. Town of Sibley*, 30 Minn. 186; 44 Am. Rep. 191.

20 *Eveleigh v. Town of Hounsfield*, 20 N. Y. Week. Dig. 210. And see *Warren v. Clement*, 24 Hun. 472.

21 *Lampert v. Gaslight Co.* 14 Mo. App. 378.

22 *Lampert v. Gaslight Co.* 14 Mo. App. 378.

23 *City of Lafayette v. Weaver*, 92 Ind. 477. In New York, the complaint in such action need not aver that the plaintiff was without fault. *Urquhart v. Ogdensburg*, 23 Hun. 75.

24 *Corporation of Bluffton v. Mathews*, 92 Ind. 213.

25 *Cin. etc. R. R. Co. v. Eaton*, 53 Ind. 407; *Pennsylvania Co. v. Smith*, 93 Ind. 42. And see *Jacob v. Railroad Co.* 10 Bush. 267.

26 *Urquhart v. Ogdensburg*, 23 Hun. 75. And see *Hackford v. Railroad Co.* 13 Abb. Pr. N. S. 18; *Haskell v. Village of Penn Yan*, 5 Laus. 43. 45.

27 *Beckwith v. Railroad Co.* 64 Barb. 299. 309.

28 *Regan v. Railroad Co.* 51 Wis. 599. And see *Woodward v. Railroad Co.* 23 Wis. 400; *Kelley v. Railroad Co.* 50 Wis. 381; *Safford v. Drew* 3 Duer. 627. 633.

29 *Wallace v. Finberg*, 46 Tex. 35; *Railroad Co. v. Le Gierse*, 51 Tex. 189.

30 *Congreve v. Morgan*, 4 Duer. 439; *City of Buffalo v. Holloway*, 7 N. Y. 493; *Taylor v. Insurance Co.* 2 Bosw. 106.

§ 175. **Negligence—Answer.**—In an action of tort for negligence, evidence that the acts or omissions of the plaintiff contributed to the injury is admissible under a general denial that the injury complained of was occasioned by the defendant.¹ And it is held, even in States where the plaintiff is not required to negative contributory negligence in his complaint, that evidence of such negligence may be given under the general denial, and that the facts need not be specially pleaded.² So under a general denial, evidence is admissible to prove that the injury resulted from the negligence of third persons.³ Under a general denial, in an action to recover damages for negligence in opening a ditch, whereby, as alleged, water was let into the plaintiff's premises, evidence that the water came, not from the ditch, but from the sewer, defects in which were the real cause of the injury, is admissible.⁴ So in an action for damage to the plaintiff's goods through the defendant's negligence, the defendant may show, under a general denial, that the goods injured did not belong to the plaintiff.⁵ But it cannot be proved, under a general denial, in an action for injuries sustained by falling into a coal-hole, brought against the owner of the premises to which it belongs, that permission or license was given by municipal authority to make the coal-hole, and such permission and license, if a fact, must be pleaded to be available.⁶ If the plaintiff's negligence is remote, and without it he still would have suffered the damage, then it is not contributory in the sense of the law.⁷ And if one sues another for a positive, willful wrong or fraud, negligence by which the injured party exposed himself to the wrong or fraud will not bar relief.⁸

1 *Brown v. Elliott*, 45 How. Pr. 182; 4 Daly, 329; *McDonell v. Bufum*, 31 How. Pr. 154; *Jonesboro etc. Turnp. Co. Baldwin*, 57 Ind. 86.

2 *St. Anthony Falls etc. Co. v. Eastman*, 20 Minn. 307. But see *Railroad Co. v. Washburn*, 5 Neb. 123.

3 Hoffman v. Gordon, 15 Ohio St. 211; Adams' Express Co. v. Darnell, 31 Ind. 20; Schular v. Railroad Co. 38 Barb. 633.

4 Schaus v. Manhattan Gaslight Co. 14 Abb. Pr. N. S. 371; 4 Jones & S. 262.

5 Brown v. Elliott, 4 Daly, 329; 45 How. Pr. 182.

6 Clifford v. Dam, 81 N. Y. 62; 12 Jones & S. 391.

7 O'Connor v. North Truckee Ditch Co. 17 Nev. 245.

8 Albany City Sav. Bank v. Burdick, 87 N. Y. 40.

§ 176. **Nuisance.**—Although a nuisance may affect the public at large, yet, where an individual suffers special injury therefrom, he is entitled to sue for relief.¹ And in a civil action for a nuisance, the complaint must state facts which in law constitute a nuisance, from which the plaintiff has suffered special injury.² The nuisance should be particularly described, and under a complaint stating facts constituting a nuisance of one kind, it is not permissible to prove a nuisance of a character essentially different.³ It is not, however, necessary to detail all the particular injuries which result from the alleged nuisance;⁴ it may be sufficient to specify the main fact, but if it is attempted to specify particularly the injuries resulting from the principal one, all that are designed to be proved should be stated.⁵ If the action is against one who continues but who did not create the nuisance, it is necessary to aver, that before the commencement of the action he had notice or knowledge of the existence of the nuisance;⁶ but a request for its abatement is not necessary.⁷ Generally speaking, negligence does not enter as an element into an action for a nuisance, and need not be alleged.⁸ Nor should the complaint or petition anticipate defenses;⁹ thus, in an action against an adjoining proprietor to recover damages for overflowing the lands of the plaintiff by means of a ditch constructed by the defendant on his own land, the complaint need not aver that such act of the defendant was wrongful and unlawful or

without license;¹⁰ the fact that the act was rightful and lawful, or one which he had license to do, is matter of defense, to be shown by the defendant in his answer, or by the evidence on the trial.¹¹ And in an action to recover damages for the maintenance of a nuisance, and to abate the nuisance, the fact that the defendant has a right by grant or prescription to maintain the alleged nuisance, and any facts which show that in equity the plaintiff should not be allowed to obtain the judgment demanded, may be set up as a defense.¹² All damages which are the necessary and natural result of a nuisance may be recovered under a general allegation of damage, and a special averment thereof in the complaint is not necessary in order to authorize a recovery.¹³ But damages which are the natural but not the necessary result of the act complained of must be specially pleaded.¹⁴ An allegation that the use of the plaintiff's cellars, and the letting thereof, were prevented by the unlawful act of the defendant, in failing to keep the privies and drains upon his premises in repair, is sufficient to authorize the admission of evidence of the rental value to show the damage done, without alleging special damages.¹⁵ A legal cause of action for damages caused by a nuisance, and an equitable cause of action to restrain the further continuance of the nuisance, may be united in the same complaint, since both arise out of the same transaction connected with the same subject of action.¹⁶

1 Bushnell v. Robeson, 62 Iowa, 540; Greene v. Nunnemacher, 38 Wis. 50; Francis v. Schoellkopf, 53 N. Y. 152; Barnes v. Racine, 4 Wis. 454; Venard v. Cross, 8 Kan. 248; Houck v. Wachter, 34 Md. 265; 6 Am. Rep. 322. See City of Denver v. Mullen, 7 Colo. 345.

2 O'Brien v. St. Paul, 18 Minn. 176; Lewiston Turnp. Co. v. Shasta etc. Co. 41 Cal. 562; Cosby v. Railroad Co. 10 Bush, 291; Smith v. McConathy, 11 Mo. 517; Grigsby v. Clear Lake Co. 40 Cal. 396.

3 O'Brien v. St. Paul, 18 Minn. 176.

4 Pinney v. Berry, 61 Mo. 350.

5 Pinney v. Berry, 61 Mo. 350.

6 *Conhocton Stone Road v. Railroad Co.* 51 N. Y. 573; *Pinney v. Berry*, 61 Mo. 359; *Pillsburg v. Moore*, 44 Me. 154; *Hubbard v. Russell*, 24 Barb. 404; *Thornton v. Smith*, 11 Minn. 15; *Bartlett v. Sman*, 24 Minn. 448.

7 *Brown v. Railroad Co.* 12 N. Y. 496; *Conhocton Stone Road v. Railroad Co.* 51 N. Y. 573; *Pinney v. Berry*, 61 Mo. 359. But see *Ray v. Sellers*, 1 Duval, 256.

8 *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184; *Hay v. Cohoes Co.* 2 N. Y. 159; *Walsh v. Mead*, 8 Hun, 387. See instances of exception to general rule: *Eagle v. Swayze*, 2 Daly, 140; *Losee v. Buchanan*, 51 N. Y. 476; *Waterman v. Railroad Co.* 30 Vt. 610; *Ackert v. Lansing*, 59 N. Y. 646; *Beck v. Carter*, 68 N. Y. 233.

9 *Bradt v. City of Albany*, 5 Hun, 591; *Barnes v. Cohoes*, 5 Hun, 604; *Akin v. Davis*, 11 Kan. 530.

10 *Wilkinson v. Applegate*, 64 Ind. 98.

11 *Wilkinson v. Applegate*, 64 Ind. 98; *St. Peter v. Dennison*, 58 N. Y. 416; *Kobs v. Minneapolis*, 22 Minn. 159; *Adams v. Walker*, 34 Conn. 468.

12 *Pennoyer v. Allen*, 51 Wis. 360.

13 *Jutte v. Hughes*, 67 N. Y. 267.

14 *Griggs v. Fleckenstein*, 14 Minn. 92; *Spencer v. Railroad Co.* 21 Minn. 362; *Vanderslice v. Newton*, 4 N. Y. 130. Special damages to a private person from a public nuisance must be particularly stated in the complaint: *Lewiston Turnp. Co v. Shasta etc. Road Co.* 41 Cal. 562.

15 *Jutte v. Hughes*, 67 N. Y. 267. See *Givens v. Studdiford*, 72 Mo. 129; 4 Mo. App. 498.

16 *Akin v. Davis*, 11 Kan. 530. In an action for damages for a nuisance, the plaintiff may also pray for an injunction and abatement: *Finch v. Green*, 16 Minn. 355. And see *Hutchins v. Smith*, 63 Barb. 251; *Tuebner v. Cal. St. Railw. Co.* Sup. Ct. Cal. 4 Pacif. L. Rep. 1162. But an action for abatement of the nuisance, and damages for the whole period of its maintenance, brought against the owner of premises, and also against persons who severally held as tenants under distinct and successive leases, is a misjoinder of causes of action: *Greene v. Nunnemacher*, 36 Wis. 50.

§ 177. **Officers.**—An action against persons named, adding "trustees of school district," is an action against the defendants as individuals, and there can be no recovery against the trustees as such.¹ So an action against city officers, sued in their individual names, with the title of their respective offices added, but without the word "as" preceding their official designations, is an action against the defendants as individuals, and not as officers of the city.² In an action to restrain commissioners from issuing town bonds in aid of a railroad, the complaint must show that the alleged com-

missioners are officers of the town, having authority to act as commissioners for the purpose of bonding the town; and it is not enough to state that they are or claim to be commissioners, with an allegation of ignorance as to the truth of the claim.³ In an action against an officer to recover back money illegally exacted by him, the plaintiff need not aver in his complaint the precise amount of money which was illegally exacted, but may recover an amount less than that stated in the complaint.⁴ In an action against an officer for a trespass committed through his deputy, it is not necessary to state in the complaint the official character of the defendant, or to charge the trespass as having been committed through a deputy.⁵ Where a deputy appointed by a public officer gives a bond for the faithful performance of his duties under the appointment, the bond so given is an official bond within the meaning of the Political Code, although payable to the principal officer, and not to the State;⁶ and the State, or any person interested, may sue upon it in the same manner as if the bond were in proper form, the defect being suggested in the complaint.⁷ The sureties in such bond are only liable for the acts of the deputy during the term of the principal officer for which the appointment was made, and the fact that the breach occurred during such term must be alleged in the complaint.⁸ A complaint against a town treasurer and his sureties, which alleges that he had not "accounted for and paid over" all the moneys he had received, "as acquired by law, though often requested," is not sufficient, without stating by whom and under what circumstances the request was made, so as to show that it was his duty to so account and pay.⁹ In filing claims for allowance before a county board, the formalities of a complaint in courts of general jurisdiction are unnecessary, it being sufficient to state

the claim in the form of an account.¹⁰ A complaint in a proceeding to have an officer adjudged disqualified or inelegible to hold an office, on account of having promised to reward a voter, is insufficient, unless it appears affirmatively that such promise, if performed, would inure to the benefit of such voter.¹¹ A defendant setting up in justification that he did the act charged, as an officer, may introduce testimony to show that, at the time of committing the act, he was an officer *de facto*, such proof being *prima facie* evidence that he was an officer *de jure*.¹²

1 Shuler v. Meyers, 5 Lana. 170.

2 Bennett v. Whitney, 94 N. Y. 302. Compare Beers v. Shannon, 73 N. Y. 292. An application at the trial to amend a complaint against individuals, as such, to one seeking a recovery against them as officers in a corporate capacity, is properly refused: Shuler v. Meyers, 5 Lana. 170.

3 Pierce v. Wright, 45 How. Pr. 1; 6 Lana. 306.

4 Meek v. McClure, 49 Cal. 623.

5 Hirsch v. Rand, 39 Cal. 315. And see Whitney v. Butterfield, 13 Cal. 342; Poinsett v. Taylor, 6 Cal. 78.

6 Hubert v. Mendheim, 64 Cal. 213.

7 Hubert v. Mendheim, 64 Cal. 213.

8 Hubert v. Mendheim, 64 Cal. 213. And see Tyler v. Nelson, 14 Gratt. 214; Thomas v. Summey, 1 Jones L. 554. But see Hughes v. Miller, 5 Johns. 167. In an action on a constable's bond for failure to pay over money collected on execution, it is unnecessary to aver or prove a demand: Nutzenholster v. State, 37 Ind. 457.

9 Supervisors v. Kirby, 25 Wis. 498. A complaint on the bond of a commissioner appointed to sell lands in partition, alleging for breach a failure to pay the money realized to the parties entitled, which avers that the money is due and unpaid, though bad on demurrer for failure to allege that the court had made an order for its payment, the defect is cured by verdict: Ferguson v. State, 90 Ind. 33.

10 Newsom v. Board of Commissioners, 92 Ind. 229; Board of Commissioners v. Gillum, 92 Ind. 511; Board etc. v. Armstrong, 91 Ind. 623; Board etc. v. Emerson, 95 Ind. 573.

11 State of Oregon v. Church, 5 Oreg. 375.

12 Willis v. Sproule, 13 Kan. 257.

§ 178. Partition.—The complaint in partition must set forth specifically, so far as known to the plaintiff, the interests of all persons in the premises sought to be partitioned.¹ It must aver that the co-tenants hold and

are in possession of real property as joint tenants or as tenants in common, in which property one or more of them have an estate of inheritance, or for life or lives, or for years;² and if these averments are not made, the complaint does not state facts sufficient to constitute a cause of action.³ The title of defendants as well as of the plaintiff should be set out, or a reason given for not so doing.⁴ But an averment that there are certain unknown owners, although their exact interests are not specified, was held to be sufficient.⁵ So the complaint should properly allege that there are no other parties in interest, or encumbrancers, than those joined or mentioned therein, though an omission in this respect does not affect the regularity of the decree.⁶ So the property must be described with common certainty;⁷ and if an account of rents is required, it should be asked for in the complaint.⁸ A complaint which discloses upon its face that persons not made parties have like interests with those set up by the plaintiff is demurrable for want of parties.⁹ The title or interest of the plaintiff in the property, as stated in the complaint, may be controverted by the answer.¹⁰ And the title or interest of any defendant in the property, as stated in the complaint, may also be controverted by his answer, or the answer of any other defendant; and the title or interest of any defendant, as stated in his answer, may be controverted by the answer of any other defendant.¹¹ But an answer which sets up nothing more than facts tending to show that the complaint does not truly state the shares and interest of the parties raises no issue, and is a nullity.¹² The want of an allegation of possession by the plaintiff should be taken by demurrer or answer, and cannot be raised for the first time on appeal.¹³ The objection that the same parties are not joint owners or tenants in common of all the property sought to be

partitioned is good, if taken by demurrer or answer, but is too late if taken for the first time at the hearing.¹⁴ The omission of a plaintiff to allege that the parties do not own any other land in common in the State is held not to be a ground of demurrer.¹⁵ Under the rule that a defendant in partition may controvert the title or interest of a co-defendant, the Statute of Limitations may be set up against a judgment and mortgage of a defendant, and it is immaterial that the answer pleading the statute is served before the answer asserting the claim.¹⁶ In an action of partition by the widow of the deceased owner of land against the grantee of the administrator of such owner's estate, an answer in effect that the defendant was induced to purchase the land at administrator's sale, by the representations of the plaintiff to him that he would get a good title to the entire land, that she, as widow, would claim no interest in such land, and that she would take her interest in the other lands owned by her deceased husband, is a good defense to the action as an estoppel *in pais*.¹⁷ In a suit for partition against infants, the guardian of their persons and estates may appear in his own name as guardian and plead in their behalf.¹⁸ A court of equity has jurisdiction over an action brought to secure a partition of personal property between tenants in common thereof;¹⁹ and when justice requires that real and personal estate be sold together, and the proceeds divided, it is within the province of a court of equity to do so in one action.²⁰ The decree of a court of first instance, by which certain lands claimed under a Mexican grant were partitioned between the grantees, who took and held possession in accordance with the decree, is no defense to an action for the partition of a portion of the lands subsequently confirmed and patented to the grantees as tenants in common.²¹

1 Cal. Code Civ. Proc. § 753; N. Y. Code Civ. Proc. § 1542; *Miller v. Sharp*, 48 Cal. 394; *Morton v. Outland*, 18 Ohio St. 333.

2 *Bradley v. Harkness*, 26 Cal. 69; *Alsbrook v. Reed*, 89 N. C. 151; *Stewart v. Monroe*, 56 How. Pr. 193; *Sullivan v. Sullivan*, 66 N. Y. 37; *Therasson v. White*, 52 How. Pr. 62; *Byers v. Danley*, 27 Ark. 77. See *Wommack v. Whitmore*, 58 Mo. 448; *Tabler v. Wiseman*, 2 Ohio St. 207.

3 *Bradley v. Harkness*, 26 Cal. 69.

4 *Senter v. De Bernal*, 38 Cal. 637; *Ship Channel Co. v. Bruly*, 45 Tex. 6; *Hanner v. Silver*, 2 Oreg. 336; *Harman v. Kelley*, 14 Ohio, 502; *Rogers v. Miller*, 48 Mo. 378.

5 *Hyatt v. Pugsley*, 23 Barb. 285; *Kane v. Rock River Canal Co.* 15 Wis. 179.

6 *Noble v. Cromwell*, 6 Abb. Pr. 59; 26 Barb. 475; 27 How. Pr. 289; 3 Abb. Ct. App. 382.

7 N. Y. Code Civ. Proc. § 1542; *Alsbrook v. Reed*, 89 N. C. 151.

8 *Bullwinker v. Ryker*, 12 Abb. Pr. 311.

9 *Rogers v. Miller*, 48 Mo. 378; *Ship Channel Co. v. Bruly*, 45 Tex. 6; *Milligan v. Poole*, 35 Ind. 64.

10 N. Y. Code Civ. Proc. § 1543.

11 N. Y. Code Civ. Proc. § 1543.

12 *Nolan v. Skelly*, 62 How. Pr. 102.

13 *Howell v. Mills*, 7 Lans. 193.

14 *Beach v. Mayor etc.* 45 How. Pr. 357.

15 *Pritchard v. Dratt*, 32 Hun, 417.

16 *Barnard v. Onderdonk*, 11 Abb. N. C. 349. That the right to partition is not affected by the lapse of the period of limitation: See *Jenkins v. Dalton*, 27 Ind. 78.

17 *Wire v. Wyman*, 93 Ind. 392. In partition by an heir against the widow and other heirs, an answer setting up a conveyance by the deceased to a third person constitutes no defense, unless they connected themselves with it, and not even then, unless their possession was hostile in its inception, or they had surrendered their prior possession and entered under the newly acquired title: *Kuolis v. Barnhart*, 71 N. Y. 474.

18 *Miller v. Smith*, 96 Ind. 226; *Bundy v. Hall*, 60 Ind. 177.

19 *Tinney v. Stebbins*, 28 Barb. 290; *Andrews v. Betts*, 8 Hun, 322.

20 *Prentice v. Janssen*, 7 Hun, 86.

21 *Mound City etc. Assoc. v. Philip*, 64 Cal. 493.

§ 179. **Partnership—Complaint.**—Where plaintiffs sue as partners, their right to sue as such depends upon the existence of a partnership, which therefore is an issuable fact, and must be alleged in the body of the complaint.¹ Thus, in an action upon notes payable to a partnership, the existence of the partnership, and that the plaintiffs are members thereof, are material

and essential facts to the plaintiffs' cause of action.² And the fact of partnership, and not the firm name, is the material allegation to be proved.³ It is however held, that if a defendant be sued as a partner, it is competent to prove that he had held himself out to the public as a partner, without alleging that fact in the complaint or petition.⁴ But in an action against partners, upon a promissory note signed by their individual names, the complaint alleged, and the court found, that the defendants were partners, and that they executed the note, yet there was held to be no sufficient averment in the complaint that the note was executed by the makers as partners, or for a consideration which passed to the partnership.⁵ An assignment by one partner of the firm property, in favor of a creditor of the firm, made without the authority of his copartner, is void;⁶ and if the assignment is so made with the authority or consent of the copartner, it must affirmatively appear in the complaint of the plaintiff, or the failure to give such authority or consent satisfactorily explained, otherwise the complaint will be open to demurrer.⁷ Ordinarily, one partner cannot sue his copartners at law in respect to their partnership doings;⁸ and a complaint in an action by one partner against another is bad, which does not allege settlement of accounts, balance struck, dissolution, nor a promise to pay.⁹ But a complaint alleging a partnership between the plaintiff and defendant, its dissolution, an accounting, a certain sum found due the plaintiff, a demand therefor and refusal to pay, and asking judgment for the amount, was held not to be demurrable, although no promise to pay the amount was alleged.¹⁰ And a complaint upon an assigned partnership account, which does not state the consideration for the assignment, and does not aver a settlement of the partnership af-

fairs, is good as against these objections first made after verdict.¹¹ A complaint by a partner against his copartners for a dissolution, which shows willful acts of fraud by the defendants, the application by them of the partnership funds to their own uses, the making by them of false entries upon the books, the preventing of the plaintiff from having access to such books, and the willful concealment from him of the condition of the partnership business, is sufficient for that purpose.¹² The right of a surviving partner to sue for the personal property and effects of the copartnership is well settled;¹³ and a complaint in such action which alleges the existence of the copartnership, the death of the copartner, and the survivorship, is sufficient.¹⁴ A surviving partner is not liable to an action by the personal representative of the deceased partner, as a general rule, until demand is made for a settlement and refused, and where a demand is necessary it should be averred in the complaint.¹⁵ But where the complaint shows that the debts of the partnership are all paid, and that the only remaining assets of the firm are the unsettled individual accounts of the partners, and states the nature and extent of the defendant's indebtedness to the plaintiff, on account of the firm's transactions, an averment of a demand before suit brought is not necessary to the sufficiency of the complaint.¹⁶ A partner who sues his associate for an accounting must aver and prove, if denied, an indebtedness, or at least a probable indebtedness.¹⁷ But it seems that he need not show whether there are outstanding claims due to or from the firm, or whether there is property owned by the firm.¹⁸ And a complaint in such action, which alleges that the plaintiff had paid on account of debts and expenses a large sum, and that upon a settlement which had been vainly sought a large sum

would be found due the plaintiff, and that the firm owned much property, its business involving a long series of transactions, is held to be good against demurrer, although it does not in terms allege that the defendant had possession of any of the partnership property, or that he had any accounts to render.¹⁹

1 *Bischoff v. Blease*, 20 S. C. 460. And see *Anable v. Conklin*, 16 Abb. Pr. 286; 25 N. Y. 470; § 32, *ante*.

2 *Bischoff v. Blease*, 20 S. C. 460. And see *Irvine v. Myers*, 4 Minn. 229.

3 *Stickney v. Carll*, 5 Minn. 486.

4 *Hancock v. Hintrager*, 60 Iowa, 374.

5 *Freeman v. Campbell*, 55 Cal. 197.

6 *Welles v. March*, 30 N. Y. 344; *Cooper v. Bowles*, 42 Barb. 88; *Stein v. La Dow*, 13 Minn. 413; *Brooks v. Sullivan*, 32 Wis. 444; *Holland v. Drake*, 29 Ohio St. 441; *Graves v. Hull*, 33 Tex. 665; *Hook v. Stone*, 34 Mo. 329.

7 *Steinhart v. Fyhrle*, Sup. Ct. Mont. 6 Pacif. L. Rep. 367.

8 See *Crater v. Blinger*, 45 N. Y. 545; *Torrey v. Twombly*, 57 How. Pr. 149; *Madge v. Puig*, 12 Hun, 15; *Foulka v. Rhodes*, 12 Nev. 225; *Blunt v. Williams*, 27 Ark. 374; *Rainsford v. Rainsford*, 57 Barb. 58.

9 *Torrey v. Twombly*, 57 How. Pr. 149. And see *Covert v. Henneberger*, 53 How. Pr. 1.

10 *Mackey v. Auer*, 8 Hun, 180. And see *Ludington v. Taft*, 10 Barb. 447.

11 *Klous v. Day*, 94 Ind. 500.

12 *Barnes v. Jones*, 91 Ind. 161. And see *Howell v. Harvey*, 5 Ark. 270.

13 *Daby v. Ericsson*, 45 N. Y. 786; *Brown v. Allen*, 35 Iowa, 306; *Bassett v. Miller*, 39 Mich. 183; *Quillen v. Arnold*, 12 Nev. 248.

14 *Manning v. Smith*, 16 Nev. 85; *Reese v. Kinkad*, 17 Nev. 447.

15 *Skillen v. Jones*, 44 Ind. 136; *Krutz v. Craig*, 53 Ind. 561.

16 *Anderson v. Ackerman*, 83 Ind. 481.

17 *Hunt v. Gordon*, 52 Miss. 194.

18 *Kuehneimundt v. Haar*, 14 Jones & S. 183.

19 *Carlin v. Donegan*, 15 Kan. 495. Compare *Lang v. Oppenheim*, 96 Ind. 47.

§ 180. *Partnership—Answer.*—A denial by answer that the plaintiffs "were copartners as alleged in the complaint or otherwise," puts in issue allegations of the copartnership of the plaintiffs.¹ In an action against several as partners, the allegation of partnership is material, and an answer denying each and every allegation of the complaint puts the partnership as well as

the joint promise alleged in issue.² In an action upon a promissory note, executed in the firm name, denial of the execution of the note puts the partnership in issue.³ But where the complaint averred that the note was indorsed by the defendants as partners, it was held that an answer denying "the indorsement in the complaint alleged" did not put the partnership in issue.⁴ In an action on the note of a partnership firm against two defendants, an answer by one that his co-defendant never was a member of the firm, and stating the names of the members of the firm, is good on demurrer.⁵ But an answer in such action by one that his copartner, without his consent, executed the note in the firm name, of which the plaintiff, at the time, had notice, is bad on demurrer;⁶ otherwise, if it be averred that the defendant, at the time of the execution of the note, did not consent and objected thereto, of which the plaintiff then had notice.⁷ If several makers of a promissory note are sued as copartners and makers, a defense by one of the makers that he was not a copartner with the other makers is immaterial, and no defense to the suit.⁸ In an action against a partnership, if one defendant sets up in answer that he was a limited partner only, the plaintiff may show that the statutory certificate as to payment of capital was false, in order to charge such defendant as a general partner.⁹ Illegality in the use of a firm name is a ground of defense, and must be affirmatively set up in the answer;¹⁰ such a defense is not available under a general denial.¹¹ In an action to recover the balance found due the plaintiff on dissolution of a partnership between him and the defendant, the answer, among other things, set forth the causes which prompted the defendant to dissolve the partnership, and the allegations in these respects were stricken out as irrelevant.¹²

- 1 *Dessaint v. Elling*, 31 Minn. 287.
- 2 *Fetz v. Clark*, 5 Minn. 217. And see *Irvine v. Myers*, 4 Minn. 223.
- 3 *Buck v. Smith*, 2 Colo. 500.
- 4 *Anable v. Conklin*, 16 Abb. Pr. 286; 25 N. Y. 470.
- 5 *Kamm v. Harker*, 3 Oreg. 208. Compare *Lefferts v. Silsby*, 54 How. Pr. 193; *Green v. Lippincott*, 53 How. Pr. 33; *Dickinson v. Vanderpoel*, 2 Hun, 628; 5 Thomp. & C. 168.
- 6 *Moffitt v. Roche*, 92 Ind. 96. And see *Sage v. Sherman*, 2 N. Y. 417; *Bank of Leadville v. Allen*, 6 Colo. 594.
- 7 *Moffitt v. Roche*, 92 Ind. 96.
- 8 *Duncan v. Randall*, 2 Utah, 181. Compare *Corning v. Haight*, 1 Code R. 71.
- 9 *Sharp v. Hutchinson*, 17 Jones & S. 50.
- 10 *O'Toole v. Garvin*, 1 Hun, 92; *Lunt v. Lunt*, 8 Abb. N. C. 76; *Stoddart v. Key*, 62 How. Pr. 137; *Hennequin v. Butterfield*, 11 Jones & S. 411.
- 11 *Waldron v. Ham*, N. Y. Daily Reg. Feb. 12, 1884; Abb. An. Dig. (1884) 206.
- 12 *Coles v. Coles*, 13 Jones & S. 633.

§ 181. *Penalties.*—In an action for a penalty founded on a statute, the complaint need not set forth the particular statute violated, unless it be a statute not judicially noticed.¹ But allegations as to time, place, or circumstance, which are necessary to inform the party against whom recovery is sought of the nature and extent of his liability, are not dispensed with.² Facts which constitute the offense must be specially set forth.³ The complaint must present a case strictly within the provisions of the statute, directly averring every essential fact, instead of leaving it to be gathered by argument or inference.⁴ And in pleading, reference to the statute is usual for the purpose of informing the defendant distinctly of the nature and character of the offense.⁵ In New York, a complaint in an action for a penalty for a violation of the excise law need not state the particular section giving the penalty claimed, but must state the name of the person to whom the illegal sale is charged to have been made.⁶ A municipal ordinance is not judicially noticed by the courts;⁷ and a complaint in an action for violating an ordinance of a

municipal corporation, to be sufficient, should set out the offense charged, and the substance of that part of the ordinance which has been violated, with a reference to the title, date, or section.⁸ Thus, a complaint to recover a penalty for violation of a town ordinance must exhibit or copy so much of the ordinance as relates to the subject;⁹ as where one section provided a penalty for selling liquor without a town license, while another made provisions for obtaining such license and the amount to be paid, both sections should be shown.¹⁰ Several penalties may be recovered in one suit and embraced in one count, if distinctly averred therein.¹¹ But an action for a penalty, given by statute to any person injured, is an action on contract,¹² and cannot be joined with an action in tort, as, for instance, an action to recover damages for illegally obstructing a navigable river.¹³ It is, however, held to be unnecessary, in an action to recover a penalty given by statute, to show a failure to pay the penalty, and the complaint need not aver non-payment, as is required in an action on a contract.¹⁴ A defendant cannot, by demurrer, avail himself of a defense denying his violation of a municipal ordinance;¹⁵ the averments of the complaint as to such violation, in the absence of an answer, must be taken as true.¹⁶

1 *Abbott v. Railroad Co.* 12 Abb. Pr. N. S. 465; *Chapman v. Gates*, 46 Barb. 313; 54 N. Y. 132; *People v. Bull*, 10 Jones & S. 19; *Nellis v. Railroad Co.* 30 N. Y. 505; *People v. McCann*, 67 N. Y. 506; *Winooski v. Gokey*, 49 Vt. 282; *Hewett v. Harvey*, 48 Mo. 368; *McHarg v. Eastman*, 35 How. Pr. 205; 7 Robt. 137.

2 *Roediger v. Simmons*, 14 Abb. Pr. N. S. 256, 262.

3 *Bigelow v. Johnson*, 13 Johns. 428; *Bartlett v. Crozier*, 17 Johns. 439; *Collins v. King Co.* 1 Wash. T. N. S. 416; *Shockley v. Brown*, 1 Wash. T. N. S. 463.

4 *Haskins v. Alcott*, 13 Ohio St. 210; *State v. Railroad Co.* 76 Me. 411.

5 *Brown v. Harmon*, 21 Barb. 506; *Shaw v. Tobias*, 3 N. Y. 188.

6 *Kee v. McSweeney*, 66 How. Pr. 447.

7 *Clevenger v. Rushville*, 90 Ind. 258, 260; *Garvin v. Wells*, 8 Iowa, 286; *Winona v. Burke*, 23 Minn. 254; *Porter v. Waring*, 69 N. Y. 250.

8 *People v. Keteltas*, 12 Hun, 65; *Deltz v. City*, 1 Colo. 323; *Whitson v. Franklin*, 34 Ind. 302; *State v. Loragan*, 40 Vt. 450; *Fink v. Milwaukee*, 17 Wis. 26.

9 *Schwab v. City of Madison*, 49 Ind. 329; *Green v. Indianapolis*, 25 Ind. 490.

10 *Clevenger v. Rushville*, 90 Ind. 258.

11 *People v. McFadden*, 13 Wend. 396; *Allen v. Patterson*, 7 N. Y. 476; *Roediger v. Simmons*, 14 Abb. Pr. N. S. 256, 261. And see *Streeter v. Railroad Co.* 40 Wis. 294; *Grover v. Morris*, 73 N. Y. 473.

12 See *Bullard v. Bell*, 1 Mason, 243.

13 *Doughty v. Railroad Co.* 78 N. C. 22. And see *Logan v. Wallis*, 76 N. C. 416; *Wiles v. Suydam*, 64 N. Y. 173.

14 *Western Union Tel. Co. v. Young*, 93 Ind. 118.

15 *Commissioners etc. v. Capeheart*, 71 N. C. 156.

16 *Commissioners etc. v. Capeheart*, 71 N. C. 156.

§ 182. **Physician and surgeon.**—In an action for malpractice, where the defendant is declared against as a physician, proof that he held himself out as “a cancer doctor,” and as having skill and experience in the treatment and cure of cancers, substantially supports the allegation;¹ and proof that the defendant accepted the employment will sustain an averment that he was employed “at his special instance and request.”² The implied liability of a physician and surgeon, retained to treat a case professionally, extends no further in the absence of a special agreement than that he will indemnify his patient against any injurious consequences resulting from his want of the proper degree of skill, care, or diligence in the execution of his employment.³ And an allegation that the defendant contracted to perfect a cure can only be sustained by proof positive of an express promise.⁴ An allegation that the plaintiff employed the defendant as a physician, etc., “to set, dress, take care of, manage, and cure a certain broken bone of the thigh of the said plaintiff, and the said defendant then and there accepted and entered upon the said employment and business,” was held not to contain a promise to cure.⁵ In an action against a surgeon, an allegation that injuries resulted from the

defendant's want of ordinary care and skill in the treatment of a fracture will not admit of proof that he gave assurances to the plaintiff that he possessed and would exercise extraordinary skill, and effect a cure;⁶ the plaintiff must recover, if at all, in accordance with his allegations.⁷ Liability in cases of malpractice does not arise out of any contract or direct privity, but out of the duty which the law imposes upon the physician to avoid acts in their nature dangerous to the lives of others;⁸ and it need not, therefore, be stated by whom the defendant was employed.⁹ A complaint alleging that the defendants, being physicians and surgeons, were called on and requested, for a reasonable compensation, to set a broken arm of the plaintiff's son, and that they undertook the same, is not bad on demurrer for not showing who employed the defendants;¹⁰ if uncertain in this respect, the proper remedy is by motion to have it made more specific.¹¹

1 Musser v. Chase, 29 Ohio St. 577.

2 Musser v. Chase, 29 Ohio St. 577.

3 Craig v. Chambers, 17 Ohio St. 253. And see O'Hara v. Wells, 14 Neb. 403; Gramm v. Boener, 56 Ind. 497; Smothers v. Hanks, 34 Iowa, 286; Carpenter v. Blake, 2 Lans. 206; 60 Barb. 488; 50 N. Y. 696.

4 Grindle v. Rush, 7 Ohio, 462; O'Hara v. Wells, 14 Neb. 403.

5 Reynolds v. Graves, 3 Wis. 416. See also Hoopingartner v. Levy, 77 Ind. 455.

6 Goodwin v. Hersom, 65 Me. 223.

7 Goodwin v. Hersom, 65 Me. 223.

8 Thomas v. Winchester, 6 N. Y. 397; Norton v. Sewall, 106 Mass. 143.

9 1 Chitty Plead. 396; Staley v. Jameson, 46 Ind. 159.

10 Scudder v. Crossan, 43 Ind. 343.

11 Scudder v. Crossan, 43 Ind. 343. In an action by a husband for damages resulting to himself from injuries to his wife caused by the malpractice of a physician, damages for loss of service which appears necessarily to result from the nature of the injury may be recovered as part of the general damages, without being specially pleaded: Stone v. Evans, 32 Minn. 243.

§ 183. Pledge. — If bonds are held by a broker as a pledge for the payment of advances made by him, and

he sells them without authority, and without notice, it is an unlawful conversion, and a demand before action need not be made nor averred in the complaint; ¹ though it would be otherwise if the broker had only pledged the stock in good faith, for the amount due him.² And where the pledgee parts with the pledge to a *bona fide* purchaser without notice of any right or claim of the pledgor, the latter cannot recover against such purchaser without averring a tender to him of the amount due on the pledge.³ As a general rule, a tender of the amount due must be averred in an action to redeem a pledge;⁴ but in the case of a pledge given to secure a running account, it is sufficient if the plaintiff offers to account with the pledgee, and to pay whatever is found due on such accounting.⁵ Where the complaint alleged a fraudulent hypothecation of the plaintiff's securities to the defendants, it was held that the latter might show, under a general denial, that they were *bona fide* holders for value.⁶ While the pledgee remains in possession of the pledge, the Statute of Limitations will not begin to run against the pledgor until tender of the debt for which the pledge was given, and a refusal by the pledgee to restore the pledge upon demand by the pledgor;⁷ and mere delay on the part of the pledgor to claim a redemption of the pledge for a period shorter than the time prescribed by the statute, as a bar to an action on the debt for which the pledge was held, will not suffice to raise a presumption against the right of the pledgor to redeem.⁸

1 Read v. Lambert, 10 Abb. Pr. N. S. 423. And see McLain v. Huffman, 30 Ark. 423; Ross v. Clark, 27 Mo. 549.

2 Read v. Lambert, 10 Abb. Pr. N. S. 423. Compare Hopper v. Smith, 63 How. Pr. 34, 37.

3 Talty v. Freedman's Sav. etc. Co. 93 U. S. 321.

4 Beatty v. Sylvester, 3 Nev. 223.

5 Beatty v. Sylvester, 3 Nev. 223. And see Stupp v. Phelps, 7 Dana, 296.

6 *Hennequin v. Butterfield*, 11 Jones & S. 411.

7 *Whelan v. Kinsley*, 23 Ohio St. 131.

8 *Whelan v. Kinsley*, 26 Ohio St. 131.

§ 184. **Possession¹ of land—Complaint.**—The former action of ejectment is known under the Code system of pleading as an action to recover the possession of land or real property.¹ The plaintiff in such action is not limited to any particular form of complaint, but the form may be adapted to the facts desired to be put in issue.² Generally speaking, it is enough for the plaintiff to set forth in such action what estate he claims in the land, and to allege that he was in possession on some day after his title accrued, and that the defendant, having afterwards entered into the possession, unlawfully withholds such possession from the plaintiff.³ He need not state in detail the facts constituting the estate or interest claimed in the land, it being sufficient to state that he has the estate.⁴ He may allege that he is seized of the premises, or of some estate therein, in fee, for life, or for years, or he may aver a former possession and ouster.⁵ But if he attempts to set forth in his complaint a specific deraignment of his title, he must aver every fact that he could be required to prove in order to recover.⁶ The complaint should not state the evidence, but only the ultimate facts constituting the cause of action.⁷ A complaint which does not state the nature or extent of the interest which the plaintiff claims therein is held not to be an objection which can be reached by demurrer, though it seems that a motion to make more specific will lie.⁸ It is not necessary to use the very expressions of the statute, that the plaintiff has "a legal interest therein," but any other language of equivalent import may be employed.⁹ But the complaint is insufficient on demurrer, for the want of sufficient facts, if it fails to show that the defendant

unlawfully keeps the plaintiff out of possession.¹⁰ It need not, however, use the exact words of the statute; ¹¹ it will be sufficient if words of similar import are used, or the averments of the complaint be such as to show the plaintiff's right to such possession, and the defendant's unlawful detention.¹² A complaint otherwise sufficient is not vitiated by an allegation that the entry was made "willfully, fraudulently, maliciously, and forcibly."¹³ The complaint must describe the property claimed with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or in some other appropriate manner.¹⁴ The description must be sufficient to enable the sheriff to identify the property, so as to know how to execute the order of the court.¹⁵ But a description is sufficient if, by the aid of a competent surveyor and persons knowing the location of monuments mentioned as points in the boundaries, the lands can be found.¹⁶ So if the land of which, in part, the defendant was in possession was definitely described, but there was indefiniteness as to that part, this is not a ground of demurrer, and the remedy, if any, is by motion to make more definite and certain.¹⁷ And where the complaint fails to describe the premises, the court may permit an amendment during the trial.¹⁸ Damages, if sought to be recovered in ejectment, must be alleged.¹⁹ But a general averment of and prayer for damages in a specified sum, for the unlawful withholding of the premises, are sufficient to support a judgment for damages, at least, in the absence of a special demurrer or objection to the evidence on the subject; ²⁰ and a finding as to the value of the use and occupation of the premises, no attack being made upon it in the court below, is conclusive as to the amount of the damages.²¹ A complaint in an action by a tenant in common or

joint tenant, to recover the possession of land held by an alleged co-tenant, which does not define or state the specific interest of the several co-tenants, is defective;²² and where the complaint, verdict, and judgment all fail to define the extent of the plaintiff's interest, and his ownership in the disputed premises, the judgment will be set aside.²³ In some States, the right to maintain ejectment for dower before it is assigned is given by statute;²⁴ and a complaint is sufficient which alleges that a person named was at his death, and had been for many years, the plaintiff's husband; that he died at a date named; that he was then the owner of the premises described; that she was entitled to one undivided third part thereof for life as dower; and that the defendant was in possession and withheld the same from her.²⁵ It is not necessary that the complaint, in addition to the allegation that the defendant wrongfully withholds the possession, shall allege that he denies the plaintiff's right.²⁶ A cause of action for the recovery of lands, with damages for withholding them, may be united in the same complaint with one for the rents and profits, or mesne profits, of the same lands.²⁷ But it is held that if a claim for rents, etc., is set up in the action for the recovery of the land, it is a bar to another and separate suit for rents.²⁸ Causes of action for the recovery of land, for the value of the rents and profits of the same land, and for the partition thereof may be united in the same action.²⁹ So the complaint in ejectment may be for two separate parcels of land, but the two causes of action must be separately stated, must affect all the parties to the action, and not require different places of trial.³⁰ But trespass, ejectment, and trespass *quare clausum fregit* cannot be joined in an action.³¹

1 See N. Y. Code Civ. Proc. § 3343, subd. 20.

2 *Caperton v. Schmidt*, 20 Cal. 479. And see *Bucher v. Carroll*, 19 Hun, 618.

3 Warner v. Nelligar, 12 How. Pr. 402; Ensign v. Sherman, 14 How. Pr. 439; Rank v. Levinus, 5 Civ. Proc. R. 368; Merrill v. Dearing, 22 Minn. 376; Wells v. Masterson, 6 Minn. 566; Payne v. Treadwell, 16 Cal. 220; Marshall v. Shafter, 32 Cal. 176; Salmon v. Symonds, 24 Cal. 286; Keller v. Ruiz de Ocana, 48 Cal. 638; Osborne v. United States, Sup. Ct. N. M. 5 West C. Rep. 242.

4 Austin v. Schluyter, 7 Hun, 276; Kan. Pac. Railw. Co. v. McBratney, 12 Kan. 9. And see Larco v. Casaneuva, 30 Cal. 560; Pease v. Hannah, 3 Oreg. 301; Murphy v. Loomis, 28 Hun, 650, 661. In an action of ejectment for the recovery of real estate, no prior demand for the surrender of possession is necessary, and none need be alleged in the complaint, unless it be apparent from its other allegations that the relation of landlord and tenant exists, or has existed, between the plaintiff and defendant in regard to such real estate: McCaslin v. State, 99 Ind. 428.

5 Caperton v. Schmidt, 26 Cal. 479; Payne v. Treadwell, 16 Cal. 220; McCauley v. Gilmer, 2 Mont. 202; Norris v. Russell, 5 Cal. 249. Under averment of ownership in fee and right to possession of premises at the time of suit brought, a party can prove any facts which would entitle him to possession at such time: Sullivan v. Dunphy, 4 Mont. 499; Gillespie v. Jones, 47 Cal. 259.

6 Castro v. Richardson, 18 Cal. 478.

7 Depuy v. Williams, 26 Cal. 309.

8 Schenck v. Kelley, 88 Ind. 444. And see Burt v. Bowles, 69 Ind. 1; Steeple v. Downing, 60 Ind. 478.

9 Dunn v. Remington, 9 Neb. 82.

10 Levi v. Engle, 91 Ind. 330; Second Nat. Bank v. Corey, 94 Ind. 457. And see Scori v. Stephens, 62 Ind. 441; Jeffersonville etc. R. R. Co. v. Oyler, 60 Ind. 383.

11 Swaynle v. Vess, 91 Ind. 584.

12 Vance v. Schroyer, 82 Ind. 114; Lovely v. Spelshoffer, 85 Ind. 454; Smith v. Kyler, 74 Ind. 575; Swaynle v. Vess, 91 Ind. 584; Van Voorhis v. Kelly, 31 Hun, 293, 296.

13 Hildreth v. White, Sup. Ct. Cal. 6 West C. Rep. 130.

14 N. Y. Code Civ. Proc. § 1511. And see St. John v. Northrup, 23 Barb. 25; City of Crawfordsville v. Boots, 78 Ind. 32; Harrison etc. Turnp. Co. v. Roberts, 33 Ind. 246.

15 Cunningham v. McCollum, 98 Ind. 38; Franco v. Allman, 77 Ind. 417; Dale v. Insurance Co. 83 Ind. 473; Lewis v. Owen, 64 Ind. 446.

16 Brown v. Anderson, 90 Ind. 93.

17 Rank v. Levinus, 5 N. Y. Civ. Proc. R. 368.

18 Olendorf v. Cook, 1 Lans. 37; Russell v. Conn, 20 N. Y. 81. The complaint need not state the residence of either of the parties. The statute provides for the trial in certain counties, and the situation of the premises, not the residence of the parties, determines the county: Doll v. Feller, 16 Cal. 432.

19 McKinlay v. Tuttle, 42 Cal. 570.

20 Dimick v. Campbell, 31 Cal. 240; Martin v. Durand, 63 Cal. 39. And see Dunn v. Remington, 9 Neb. 82.

21 Martin v. Durand, 63 Cal. 39; Miller v. Myers, 46 Cal. 535. A claim for damages for withholding possession does not include the rents and profits, the latter being a separate and distinct cause of action: Livingston v. Tanner, 12 Barb. 481; Larned v. Hudson, 57 N. Y. 151.

22 *Lillianskyoldt v. Goss*, 2 Utah, 292. See as to actions of ejectment by a tenant in common or joint tenant: *Hasbrouck v. Bunce*, 62 N. Y. 475; *Trustees etc. v. Johnson*, 66 Barb. 119; *Hart v. Robertson*, 21 Cal. 346; *French v. Edwards*, 5 Sawy. 286; *Sharon v. Davidson*, 4 Nev. 416; *Mobley v. Bruner*, 59 Pa. St. 481; *Weese v. Barker*, 7 Colo. 178.

23 *Lillianskyoldt v. Goss*, 2 Utah, 292.

24 See *Ellicott v. Mosier*, 7 N. Y. 201; *Poor v. Horton*, 15 Barb. 485.

25 *Draper v. Draper*, 11 Hun, 616.

26 *McKay v. Freeman*, 6 Oreg. 449.

27 *Lord v. Dearing*, 24 Minn. 110; *Merrill v. Dearing*, 22 Minn. 376; *McKinney v. McKinney*, 8 Ohio St. 423. And see *Armstrong v. Hinds*, 8 Minn. 254; *Sullivan v. Davis*, 4 Cal. 241; *Vandevoort v. Gould*, 36 N. Y. 639.

28 *Walker v. Mitchell*, 18 Mon. B. 541. See *Burr v. Woodrow*, 1 Bush, 602.

29 *Scarborough v. Smith*, 18 Kan. 399.

30 *Boles v. Cohen*, 15 Cal. 150.

31 *Smith v. Hallock*, 8 How. Pr. 73; *Budd v. Bingham*, 18 Barb. 494.

2 185. **Possession of land—Answer.**—The defendant in ejectment need only defend against the material allegations in the complaint, that is, the allegations material to constitute a complaint in ejectment.¹ Although, by statute, the defendant in such action may avail himself of any legal defense under the general denial,² he may, nevertheless, set out fully and specifically the facts constituting his defense, in which case his answer is to be governed by the ordinary rules of pleading.³ Under a general denial, the defendant may show, by any legal evidence which he may have, that he is the owner of the land in controversy;⁴ and may prove any fact tending to show that the plaintiff has not the title, or the right of possession.⁵ If the defendant denies the plaintiff's title and right of possession, and the answer also sets up the Statute of Limitations and other defenses, they may be regarded as surplusage, being merely another form of denying the plaintiff's title;⁶ and a failure to reply to such second and additional defenses does not entitle the defend-

ant to judgment.⁷ An averment in answer that the plaintiff's grantor had made a prior sale to the defendant, amounts only to a denial of the plaintiff's title, and does not need a reply.⁸ An answer denying that the plaintiff was seized in fee simple of the land, or entitled to the possession thereof, as alleged in the complaint, amounts to a general denial, and is good.⁹ The recital in the answer of the series of facts through which the defendant claims a right to the land are mere averments of evidence, and amount to no more than a general denial.¹⁰ If the entry and ouster are denied in the answer, the withholding of possession at the commencement of the action need not be specially denied.¹¹ If the defendant desires to set off the value of his improvements against the mesne profits, he must assert his right by proper averments in his answer, or he is precluded from doing so at the trial.¹² The defendant may, of course, interpose an equitable defense;¹³ but facts which constitute an equity must be pleaded in order to be available as a defense to an action of ejectment.¹⁴ If the defendant has the equitable estate he can set it up as a defense.¹⁵ So he can set up as a defense that the land in question was intended to be conveyed to him by a deed from the plaintiff, but by a mistake in the description was not included.¹⁶ So one in possession under an executory contract to purchase may show that he is entitled to specific performance of the contract.¹⁷ If the defendant in his answer sets up a claim of title, he is concluded from disputing the validity of the same title when asserted by the plaintiff.¹⁸

1 *Doyle v. Franklin*, 48 Cal. 537.

2 See *Gaff v. Greer*, 88 Ind. 122.

3 *Vanduyne v. Hepner*, 45 Ind. 589; *Wicks v. Smith*, 18 Kan. 508; *Winslow v. Winslow*, 52 Ind. 8.

4 *Hall v. Dodge*, 18 Kan. 277.

5 *Wicks v. Smith*, 13 Kan. 508; *Creque v. Sears*, 17 Hun, 123, 125; *Reynor v. Timerson*, 46 Barb. 518.

6 *Bledsoe v. Simms*, 53 Mo. 305; *Nelson v. Brodbeck*, 44 Mo. 596; *Treon v. Emerick*, 6 Ohio, 332; *Wintermute v. Montgomery*, 11 Ohio St. 441; *Kyser v. Cannon*, 29 Ohio St. 359; *Rhodes v. Gunn*, 35 Ohio St. 387.

7 *Kyser v. Cannon*, 29 Ohio St. 359. But see *contra*, *Davis v. Clark*, 2 Mont. 310. And compare *Sullivan v. Dunphy*, 4 Mont. 499.

8 *Thompson v. Thompson*, 52 Cal. 154.

9 *Ransom v. Anderson*, 9 S. C. 438.

10 *Clink v. Thurston*, 47 Cal. 21.

11 *Hawkins v. Reichert*, 28 Cal. 534. See *Busenius v. Coffee*, 14 Cal. 91; *Smith v. Doe*, 15 Cal. 100.

12 *Moss v. Shear*, 25 Cal. 44.

13 *Corkhill v. Landers*, 44 Barb. 218; *Traphagen v. Traphagen*, 40 Barb. 537; *Penny v. Cook*, 19 Iowa, 538; *McClane v. White*, 5 Minn. 178; *Maasie v. Stradford*, 17 Ohio St. 596; *Lestrade v. Barth*, 19 Cal. 660; *Coolbaugh v. Roemer*, 32 Minn. 445.

14 *Dewey v. Hoag*, 15 Barb. 365; *Lombard v. Cowham*, 34 Wis. 486; *Rollins v. Henry*, 78 N. C. 342; *Henry v. McKerlie*, 78 Mo. 416, 430; *Powers v. Armstrong*, 36 Ohio St. 357; *McCauley v. Fulton*, 44 Cal. 355; *Lamme v. Dodson*, 4 Mont. 560. An answer in ejectment setting up an equitable defense is in the nature of a bill in equity, and must contain its essential averments: *Downer v. Smith*, 24 Cal. 124; *Blum v. Robertson*, 24 Cal. 146; *Miller v. Fulton*, 47 Cal. 146; *Estrada v. Murphy*, 19 Cal. 248. Adverse possession must be pleaded, and cannot be shown under the general issue: *Hansee v. Mead*, 27 Hun, 162. And see *McCreery v. Duane*, 52 Cal. 262. So estoppel must be pleaded: *Dewey v. Hoag*, 15 Barb. 365; *Raynor v. Timerson*, 46 Barb. 518. But see *Phillips v. Blair*, 38 Iowa. 637.

15 *Lamont v. Chestre*, 6 Lana. 234; 65 N. Y. 30. See *Webster v. Bond*, 9 Hun, 437. An equitable title to an infant's estate may be set up as a defense in ejectment by a purchaser of it on a sale made by order of court: *Wood v. Mather*, 44 N. Y. 249; 38 Barb. 473.

16 *Hoppough v. Struble*, 60 N. Y. 430.

17 *Cavalli v. Allen*, 57 N. Y. 508. And see *Arguello v. Edinger*, 10 Cal. 150; *McCarty v. Myers*, 5 Hun, 83.

18 *Henderson v. Scott*, N. Y. Sup. Ct. 12 N. Y. Week. Dig. 363.

2 186. **Quieting title—Complaint.**—Codes of procedure in several of the States authorize any person in possession of real property, by himself or his tenant, to commence an action against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim.¹ In a few of the States, the action is allowed to any person having or claiming an interest in real property, whether in or out of possession.² In California, the action may be brought by any person against another who claims an

estate or interest adverse to him.³ And in New York, one in possession for three years under a claim in fee, or for life, or for a term of years not less than ten, may maintain the action;⁴ and the facts which the complaint must set forth are prescribed.⁵ It is held that the language of the statute should be construed to give jurisdiction in every case in which a claim or lien upon real property appears to be asserted, or to exist;⁶ and it is not necessary that the adverse claim should relate to or affect the right of present possession.⁷ The plaintiff has the right to be quieted in his title whenever any claim is made to real property of which he is in possession, the effect of which claim might be litigation or a loss to him of the property.⁸ But it is well settled, that if one has a full, complete, and adequate remedy at law, he cannot maintain an equitable action to quiet the title.⁹ Under Codes which give the right of action to one in possession, the complaint must allege that the plaintiff was in possession at the time of the commencement of the action.¹⁰ So the complaint must show that the defendant's claim is adverse to the title asserted by the plaintiff, or is unfounded, and a cloud upon the plaintiff's title.¹¹ And, according to some decisions, the complaint should state facts showing the character, nature, extent, and invalidity of the defendant's claim which constitutes the cloud upon the plaintiff's title to the lands in question.¹² And a complaint alleging that the defendant claims the land in question under certain deeds, and that her claim is "without foundation in law," but stating no facts showing such deeds to be invalid, was held to be insufficient on demurrer.¹³ On the other hand, it was held that a complaint alleging that the plaintiff owns the land in fee, and that the defendant is making an unfounded claim of title thereto, sufficiently shows that the defendant claims title "ad-

verse" to the plaintiff.¹⁴ So a complaint which avers that the plaintiff "is the owner in fee simple," etc., is not vitiated by another averment that "the plaintiff on," etc., "conveyed said premises to" a third person.¹⁵ But a complaint which avers generally that the plaintiff is seized in fee simple, and then proceeds to set forth the facts which constitute his title, is bad on demurrer if the facts so stated do not show title in him.¹⁶ So a complaint which states the specific facts upon which the plaintiff's title rests, and thereby discloses that the defendant has an interest, is bad on demurrer, though it be also alleged generally that the plaintiff "holds the land in law and equity, discharged of and free from all claims and liens of" the defendant;¹⁷ the latter allegation is a mere general conclusion of law, and does not exert a controlling influence upon the pleading.¹⁸ In a complaint to quiet title and to set aside a deed, the action is not founded upon the deed, and a copy of the deed is not a necessary part of the complaint.¹⁹ In a suit to ascertain and quiet title the plaintiff cannot, at his option, split it up into many suits; and if he omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot afterward bring another suit upon the fragment or portion of the case omitted.²⁰ A cross-complaint in such action, which describes the property, omitting the county and State, but designating it as "the real estate in complaint mentioned," is held to be sufficient;²¹ such a reference is not for the purpose of supplying a needed statement of fact, but is for identification only.²² Under Illinois practice, a bill to quiet title or remove a cloud from title to land which fails to show that the complainant is in possession, or that the premises are unoccupied and unimproved, is bad on demurrer, as not showing a case of equitable jurisdiction.²³

1 See 2 Ohio Rev. Stats. § 5779; *Douglass v. Scott*, 5 Ohio, 194; *Thomas v. White*, 2 Ohio St. 540; *Oreg. Gen. Laws*, § 500; *Colo. Code*, § 2-7; *Kan. Code*, § 534; 1 *Comp. Laws Nev.* § 72; *Utah Code*, § 254; *Wis. Rev. Stats.* (1878) § 3188.

2 See *Iowa Code*, §§ 3273, 3274; *Lewis v. Soule*, 52 Iowa, 11; *Lees v. Wetmore*, 58 Iowa, 170; *Miller v. Davison*, 31 Iowa, 435; *Gen. Stats. Neb.* (1881) p. 394, § 57; *Rev. Stats. Ind.* (1881) § 1070.

3 *Cal. Code Civ. Proc.* § 738; *Stoddard v. Burge*, 53 Cal. 394.

4 *N. Y. Code Civ. Proc.* § 1638. And see *Austin v. Goodrich*, 49 N. Y. 286; *Ford v. Belmont*, 63 N. Y. 567; *Boylston v. Wheeler*, 61 N. Y. 521; *Schroeder v. Guernsey*, 10 Hun, 413; 73 N. Y. 430. Possession must be such as would enable the adverse party to maintain ejectment founded on that fact alone: *Cleveland v. Crawford*, 7 Hun, 616.

5 *N. Y. Code Civ. Proc.* § 1630. See *Churchill v. Onderdonk*, 59 N. Y. 134. The plaintiff may amend his complaint in this action as in other actions: *Brown v. Leigh*, 12 Abb. Pr. N. S. 193; 49 N. Y. 78. A complaint containing all the allegations necessary to constitute a cause of action for the removal of a cloud upon title, is sufficient to sustain a trial conducted in a form appropriate to such cause of action, though the prayer is in ejectment: *Zimmerman v. Schoenfeldt*, 3 Hun, 632. And see *Lavery v. Sexton*, 41 Iowa, 435; *Faton v. Lancaster*, 38 Iowa, 404.

5 *Bogert v. City of Elizabeth*, 27 N. J. Eq. 568.

7 *Rhea v. Dick*, 34 Ohio St. 420.

8 *Joyce v. McAvoy*, 31 Cal. 274. And see *Donnhue v. O'Connor*, 13 Jones & S. 273; *Burnham v. Onderdonk*, 41 N. Y. 423, 425; *Stoddard v. Burge*, 53 Cal. 394.

9 *Weed Sewing Machine Co. v. Oberreich*, 39 Wis. 320; *Gray v. Tyler*, 40 Wis. 579; *Greenwalt v. Duncan*, Cir. Ct. Mo. 16 Fed. Rep. 35. And see *Culver v. Rogers*, 33 Ohio St. 5-7; *Ellithorpe v. Buck*, 17 Ohio St. 72; *Boorman v. Sunnuchs*, 42 Wis. 233; *Scott v. Means*, 80 Ky. 460.

10 *Pier v. Fond du Lac*, 38 Wis. 470; *Douglass v. Nuzum*, 16 Kan. 515; *Thomas v. White*, 2 Ohio St. 540; *Scott v. Kramer*, 31 Ohio St. 245; *Eastman v. Lamprey*, 12 Minn. 153; *N. Y. Code Civ. Proc.* § 1630, subd. 2. And see *Boylston v. Wheeler*, 61 N. Y. 521; *Bailey v. Briggs*, 56 N. Y. 407; *Cleveland v. Crawford*, 7 Hun, 616; *Ford v. Belmont*, 63 N. Y. 567; *Cartwright v. McFadden*, 24 Kan. 632. That it must also appear that he is in possession under some claim of right or title: See *Holland v. Challen*, 110 U. S. 25; *Goldsmith v. Gilliland*, Cir. Ct. Oreg. 5 West. C. Rep. 529. Under the Indiana statute, it is not necessary to allege in the complaint either that the plaintiff is entitled to the possession, or has demanded possession, before the commencement of the suit: *McCaslin v. State*, 99 Ind. 423.

11 *Marot v. Germania etc. Assoc.* 54 Ind. 37; *Schori v. Stephens*, 62 Ind. 441; *Jeffersonville etc. R. R. Co. v. Oyler*, 60 Ind. 383; *Second Nat. Bank v. Corey*, 94 Ind. 457; *Scorpion Silver Min. Co. v. Marsano*, 10 Nev. 370; *Eastman v. Lamprey*, 12 Minn. 153; *Goldsmith v. Gilliland*, Cir. Ct. Oreg. 5 West. C. Rep. 529; *Bailey v. Hughes*, 35 Ohio St. 567; *Cartwright v. McFadden*, 24 Kan. 662.

12 *McDonald v. Early*, 15 Neb. 63; *Page v. Kennan*, 33 Wis. 320; *King v. Higgins*, 3 Oreg. 406; *Teal v. Collins*, 9 Oreg. 83; *Hibernia Sav. & Loan Soc. v. Ordway*, 38 Cal. 681; *Wals v. Grosvenor*, 31 Wis. 694; *Jenks v. Hathaway*, 43 Mich. 536. Compare *Douglass v. Nuzum*, 16 Kan. 515; *Goldsmith v. Gilliland*, Cir. Ct. Oreg. 5 West. C. Rep. 529.

13 *Page v. Kennan*, 38 Wis. 320. And see *Hibernia Sav. etc. Soc. v. Ordway*, 38 Cal. 678.

BOONE PLEAD. — 31.

- 14 *Gillett v. Carshaw*, 50 Ind. 381.
- 15 *Indiana etc. R. R. Co. v. Brittingham*, 98 Ind. 294.
- 16 *Keepfer v. Force*, 86 Ind. 81.
- 17 *Ragsdale v. Mitchell*, 97 Ind. 458.
- 18 *Platter v. City of Seymour*, 86 Ind. 323; *Mescall v. Tully*, 91 Ind. 96. And see *Richardson v. Snider*, 72 Ind. 425; 37 Am. Rep. 168; *McMahan v. Newcomer*, 82 Ind. 565; *Petty v. Trustees etc.* 95 Ind. 278.
- 19 *Stribling v. Brougher*, 79 Ind. 328. See, as to sufficiency of description of land in the complaint, *Pitcher v. Dove*, 99 Ind. 175.
- 20 *Starr v. Stark*, Cir. Ct. Oreg. 1 Sawy. 270.
- 21 *Cookerly v. Duncan*, 87 Ind. 332.
- 22 *Cookerly v. Duncan*, 87 Ind. 332.
- 23 *Hardin v. Jones*, 86 Ill. 313; *Gage v. Abbott*, 99 Ill. 366; *Gage v. Griffin*, 103 Ill. 41.

§ 187. **Quieting title—Answer.**—In an action to quiet title to real property, a denial of the plaintiff's possession forms an issue that must be tried.¹ The direct averment of the complaint that the plaintiff is in possession is susceptible of a plain denial, and if not so denied is admitted;² and the averment of possession is admitted by an answer which simply argues against such possession, nor does the general statement that "all allegations, except as before admitted, are denied," render such an ambiguous denial any the less an admission.³ Where the defendant by his answer disclaims all right and title adverse to the plaintiff, but also denies the latter's title, it is error in the court to enter upon a trial of the cause;⁴ that portion of the defendant's answer denying the plaintiff's title being a mere nullity and surplusage.⁵ Where the answer, without any denial of the allegations of the complaint, only sets up a specific title, it is error to admit evidence of any other than the title pleaded;⁶ but where the answer also contains a general denial, any legal testimony tending to show that the plaintiff is not the owner as alleged is admissible.⁷ If in such action it be shown that the plaintiff is in the actual possession of the property in controversy, the defendant cannot defeat the

action by showing a paramount right in a third person, even though he be a co-defendant;⁸ he can only defeat the action by showing a paramount right in himself.⁹ An answer setting up facts essential to a complaint in ejectment against the plaintiff, and asking that the possession of the premises be awarded to the defendant, does not contain a counter-claim which will prevent the plaintiff from dismissing the action.¹⁰ Pleading the Statute of Limitations in an action to quiet title does not admit the validity of the title of the opposite party,¹¹ and the owner in possession may maintain the action against the adverse claim of the owner of a tax title barred by the statute.¹²

1 Meighen v. Strong, 6 Minn. 177. And see Babo v. Phelps, 65 Mo. 27; Garvey v. Willis, 50 Cal. 619. That where the allegations of the complaint, except that of adverse claim, are denied, mere proof of possession or title with possession does not make out a *prima facie* case, or throw the burden of proof upon the defendant to produce his claim: See Blasdel v. Williams, 9 Nev. 161.

2 Bredell v. Alexander, 8 Mo. App. 110, 113.

3 Bredell v. Alexander, 8 Mo. App. 110.

4 Jordon v. Stevens, 53 Mo. 361.

5 Jordon v. Stevens, 53 Mo. 361.

6 Morrill v. Douglass, 14 Kan. 233.

7 Morrill v. Douglass, 14 Kan. 233. See Brenner v. Bigelow, 8 Kan. 496; Glittenan v. Lemert, 13 Kan. 476.

8 Brenner v. Bigelow, 8 Kan. 496.

9 Brenner v. Bigelow, 8 Kan. 496.

10 Moyle v. Porter, 51 Cal. 632. Compare Cooper v. Jackson, 71 Ind. 244.

11 Tabler v. Callanan, 49 Iowa, 362. See Winslow v. Winslow, 52 Ind. 8.

12 Tabler v. Callanan, 49 Iowa, 362. And see Peck v. Sexton, 41 Iowa, 566; Wallace v. Sexton, 41 Iowa, 257.

§ 188. *Quo warranto*.—Proceedings in the nature of a *quo warranto* are a civil action under the Code system of pleading.¹ But it is only the form of the proceeding that has been done away with, and the remedies formerly to be obtained by writ of *quo warranto*, and proceedings by information in the nature thereof, are now to be had by a civil action.² The position of the

defendant, the rules of evidence, and the presumptions of law and fact are the same as in the proceeding by writ or information, for which the remedy by action was substituted.³ The action furnishes the only remedy for determining the title to office,⁴ and will lie only where the party proceeded against is either a *de facto* or *de jure* officer in possession of the office.⁵ In such action it is not necessary to allege or prove that any of the relators are entitled to the office claimed.⁶ And a complaint which alleges that the defendant has unlawfully usurped the duties of an office, and that no such office exists, and that his acts are without authority, is held to be sufficient.⁷

1 *People v. Cook*, 8 N. Y. 67; *People v. Clute*, 32 N. Y. 576; 10 Am. Rep. 508; 12 Abb. Pr. N. S. 339; *State v. Thompson*, 34 Ohio St. 355; N. Y. Code Civ. Proc. § 1983.

2 *People v. Hall*, 80 N. Y. 117.

3 *People v. Thacher*, 55 N. Y. 425; 14 Am. Rep. 312.

4 *Palmer v. Foley*, 45 How. Pr. 110; 4 Jones & S. 14; 44 How. Pr. 203.

5 *People v. Common Council of Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 63. See *Hudson River R. R. Co. v. Kay*, 14 Abb. Pr. N. S. 191. As a general rule, *quo warranto* will not lie to remove an incumbent from office where the law affords another plain and adequate remedy for the acts or omissions complained of: *State v. Wilson*, 30 Kan. 661.

6 *People v. Murray*, 8 Hun, 577. In Indiana, a *quo warranto*, prosecuted on the relation of one who claims the office, is bad if it does not show that the relator is eligible thereto: *State v. Bieler*, 87 Ind. 320; *State v. Long*, 91 Ind. 351.

7 *People v. Carpenter*, 24 N. Y. 80. See *McVeany v. Mayor etc.* 50 How. Pr. 108; 80 N. Y. 133.

§ 189. *Railroads—Injury to animals.*—In an action against a railroad company for killing stock, a complaint which alleges that the place where the stock entered upon the track "was not fenced" is sufficient upon that point.¹ And a complaint otherwise sufficient is not bad for failing to aver that the road could have been fenced at the point where the stock entered upon it.² If the road could not properly be fenced at the place in question, that fact is matter of defense, con-

cerning which the complaint need not make any averment.³ An allegation that the road was "unfenced" is sustained by proof that the fence once erected had been destroyed, and that no fence had since been erected.⁴ In an action under the Missouri statute against a railroad company for killing stock, the complaint need not specifically allege that the injury was occasioned by the failure to fence or to maintain cattle-guards, or that the injury was not within the limits of an incorporated city or town;⁵ it is sufficient if these facts may be inferred from the allegations of the complaint.⁶ A complaint which alleged that the animal, without any fault on the part of the plaintiff, strayed upon the defendant's track, and that it was struck and killed at a point where the railroad passed along through and adjoining enclosed and cultivated fields, and that at that point the defendant had failed to build and maintain lawful fences to prevent said animal from straying on its track, was held to be sufficient.⁷

1 Louisville etc. R. R. Co. v. Shanklin, 94 Ind. 297. Compare Louisville etc. R. R. Co. v. Harrigan, 94 Ind. 245; Louisville etc. R. R. Co. v. Skelton, 94 Ind. 222; Jeffersonville etc. R. R. Co. v. Lyon, 72 Ind. 107; Louisville etc. R. R. Co. v. Quade, 91 Ind. 295.

2 Louisville etc. R. R. Co. v. Hall, 93 Ind. 245.

3 Terre Haute etc. R. R. Co. v. Penn, 90 Ind. 284; Jeffersonville etc. R. R. Co. v. Lyon, 55 Ind. 477; 72 Ind. 107; Fort Wayne etc. R. R. Co. v. Mussetter, 48 Ind. 286.

4 Fritz v. Railroad Co. 61 Iowa, 323.

5 Campbell v. Railroad Co. 78 Mo. 639; Perriquez v. Railroad Co. 78 Mo. 91. Compare Nauce v. Railroad Co. 79 Mo. 196; Hudgens v. Railroad Co. 79 Mo. 418; Dryden v. Smith, 79 Mo. 525.

6 Campbell v. Railroad Co. 78 Mo. 639. And see Terry v. Railroad Co. 77 Mo. 254; Bowen v. Railroad Co. 75 Mo. 426; Edwards v. Railroad Co. 74 Mo. 117; Scott v. Railroad Co. 75 Mo. 136; Blakely v. Railroad Co. 79 Mo. 388; Morris v. Railroad Co. 79 Mo. 367.

7 Terry v. Railroad Co. 77 Mo. 254. And see Kronski v. Railroad Co. 77 Mo. 362; Chubbuck v. Railroad Co. 77 Mo. 591. In a complaint against a railroad company for killing animals while operating the road of another company, it is not necessary to allege in what name the road was being operated: Cin. etc. R. R. Co. v. Leviston, 97 Ind. 488.

§ 190. **Receivers.**—The grounds for the appointment of a receiver need not be incorporated into the plead-

ings;¹ all that the pleadings need disclose is, that the action pending is one of a class in which the appointment of a receiver is authorized, and the special reasons therefor may be set out on a motion.² A receiver, in the absence of statutory authority, can neither sue nor be sued without leave of the court by which he was appointed.³ And where a receiver is not authorized to sue in his own name by statute, or in a proper case by the court appointing him, he cannot do so, but must sue in the name of the corporation or person in whom was the right of action before the appointment of the receiver.⁴ So it has been held to be essential in an action by or against a receiver, to aver in the complaint that leave to bring the action had been granted by the proper court.⁵ But on the other hand, the omission of the averment was held to be no ground of demurrer to the complaint.⁶ And in an action against a corporation, it was held that the defendant could not plead either in bar or abatement, that such corporation was in the hands of a receiver, and that such action was brought without leave of the court in which such receiver was appointed, though by bringing such suit without leave the plaintiff may have been guilty of a contempt.⁷ In an action by a receiver, a mere denial that he was properly qualified as such is not sufficient to put that fact in issue, but the facts relied upon should be specially pleaded.⁸ Where the answer merely denies the plaintiff's appointment as receiver, such appointment being proved shows the plaintiff's legal capacity to sue, and the objection not having been taken by demurrer or answer must be deemed to have been waived.⁹

1 *Hottenstein v. Conrad*, 9 Kan. 435; *Commercial etc. Bank v. Corbett*, 5 Sawy. 172; *Manley v. Rassiga*, 13 Hun, 288.

2 *Hottenstein v. Conrad*, 9 Kan. 435.

3 *Foster v. Townshend*, 2 Abb. N. C. 29; 68 N. Y. 203; *Battle v. Davis*, 66 N. C. 252; *Winfield v. Bacon*, 24 Barb. 154; *King v. Cutts*, 24

Wis. 627; *De Groot v. Jay*, 30 Barb. 483; *In re Platt*, 9 Jones & S. 513; *Higgins v. Wright*, 43 Barb. 461; *Barton v. Barbour*, 3 McAr. 212; 36 Am. Rep. 104; 104 U. S. 126. And see *Meara v. Holbrook*, 20 Ohio St. 137.

4 *King v. Cutts*, 24 Wis. 627; *Newell v. Fisher*, 24 Miss. 392; *Manlove v. Burger*, 38 Ind. 211; *Yeager v. Wallace*, 44 Pa. St. 294; *Battle v. Davis*, 66 N. C. 252.

5 *Garver v. Kent*, 70 Ind. 428; *Moriarty v. Kent*, 71 Ind. 601; *Keen v. Breckenridge*, 96 Ind. 69. And see *Herron v. Vance*, 17 Ind. 595; *Coope v. Bowles*, 28 How. Pr. 10; *Watts v. Everett*, 47 Iowa, 269; *Scofield v. Doscher*, 72 N. Y. 491.

6 *Leuthold v. Young*, Sup. Ct. Minn. 19 N. W. Rep. 652; 33 Minn. 122. And see *Finch v. Carpenter*, 5 Abb. Pr. 225. That the objection can be taken only before answer: See *State v. Cason*, 11 S. C. 392.

7 *Ohio etc. Railroad Co. v. Nickless*, 71 Ind. 271.

8 *Goodhue v. Daniels*, 54 Iowa, 19.

9 *Manseau v. Mueller*, 45 Wis. 430.

§ 191. **Recognizance.**—An action on a forfeited recognizance must be brought in the name of the State.¹ In New York, whenever any recognizance to the people is forfeited, the district attorney of the county in which it was taken is the proper officer to prosecute for the alleged breach.² It is not necessary to insert in a complaint on a forfeited recognizance a copy of the order of forfeiture, nor to allege that the order of forfeiture was "duly made."³ Nor need the complaint aver non-payment of the penalty.⁴ Nor is it necessary in such action to allege or prove any damages, by reason of the breach of the condition.⁵ And where the condition of a recognizance is to do an act for which a recognizance may properly be taken, and the officer had authority, in law, to act in cases of that general description, a complaint upon such recognizance need not set out the particular facts and circumstances which gave the officer authority to take it.⁶ Under an averment in the complaint, that "the bond was taken in writing in such manner and form as the law provides and directs," it will be understood that all the requirements of the law applicable in such cases were complied with.⁷ In an action upon a forfeited recognizance, given upon the continuance of a criminal cause from

one term to another, an allegation of the filing of an information, an order of continuance, etc., is sufficient, without averring a prior arrest, a preliminary examination, or a waiver of one.⁸ But a complaint in an action on a recognizance for the defendant's appearance in a criminal case should show that the prisoner was charged with a crime, and it is not sufficient to state that he was charged with "shooting and killing" another.⁹ In such action, the sureties cannot set up as a defense the fact that the amounts in which they justified were insufficient under the statute;¹⁰ the justification is no part of their contract, and in no manner affects their liability.¹¹ To maintain an action upon a recognizance given upon the conviction of one as a disorderly person, for neglecting to support his wife and children, it must be made to appear that subsequent to the giving of the bond the person has been guilty of such neglect;¹² the conviction is not evidence of a subsequent breach of the condition of the recognizance.¹³

1 *Gamble v. State*, 21 Ohio St. 183; *Clark v. Petty*, 29 Ohio St. 452. See *Shelby County v. Simmonds*, 33 Iowa, 345.

2 N. Y. Code Civ. Proc. § 1966; *People v. Meyers*, 1 Sheldon, 429. An action on a forfeited bail bond may be brought in the name either of the people or of the county, and the district attorney is authorized to bring the action: *People v. De Pelanconi*, 63 Cal. 409.

3 *Rheinhardt v. State*, 14 Kan. 318.

4 *State v. Grant*, 10 Minn. 39.

5 N. Y. Code Civ. Proc. § 1966. A complaint on a forfeited recognizance alleging the jurisdiction of the court, and its entry of judgment of forfeiture, was held sufficient: *Friedline v. State*, 93 Ind. 366.

6 *People v. Kane*, 4 Denio, 530; *Champlain v. People*, 2 N. Y. 83; *People v. Mills*, 5 Barb. 511. And see *McLaughlin v. State*, 10 Kan. 581.

7 *Shelby County v. Simmonds*, 33 Iowa, 345.

8 *Jennings v. State*, 13 Kan. 80. And see *Mix v. People*, 26 Ill. 32.

9 *Hannah v. Wells*, 4 Oreg. 249. But see dissenting opinion by *McArthur, J.*: *Hannah v. Wells*, 4 Oreg. 255.

10 *People v. Shirley*, 18 Cal. 121.

11 *People v. Shirley*, 18 Cal. 121. See *People v. Tubbs*, 37 N. Y. 586; *People v. Cushney*, 44 Barb. 118; *People v. Cook*, 30 How. Pr. 110.

12 *People v. Pettit*, 74 N. Y. 320.

13 *People v. Pettit*, 74 N. Y. 320.

§ 192. **Redemption.**— One who brings suit to redeem from a mortgage must show by his complaint that he has an interest in the equity of redemption.¹ The doctrine is, that when a person other than the mortgagor sues to redeem mortgaged premises, his complaint must show that he has some title or interest in the land derived immediately or remotely through the mortgagor, or in some way springing out of his general equity of redemption ;² and it must show the nature and derivation of the title or interest claimed, that the defendant may, by his answer, admit or deny it, and be prepared to meet it in evidence, or refer the question of its sufficiency to the court by demurrer.³ So in a suit to redeem lands sold under foreclosure, the complaint must show affirmatively that the plaintiff was not made a party defendant in the foreclosure suit ;⁴ the law presumes that the proper parties were before the court, and the complaint must negative that presumption.⁵ A complaint to redeem, in order to be good, must contain an averment of a readiness to pay, or an offer to pay whatever is found to be due.⁶ But one who has purchased mortgaged lands at a sheriff's sale, if not made a party to a suit to foreclose brought before his right to a sheriff's deed matures, may, after his title matures, redeem, and in such case the complaint to redeem need not aver a tender or offer to pay the money necessary to redeem ;⁷ it is sufficient where an accounting of rents is also sought to allege that the plaintiff is ready and willing to redeem when the amount necessary to be paid therefor shall be ascertained, and intends so to do, and that he has demanded an accounting which was refused.⁸ And in cases where the amount due can be made a lien on the land, it is unnecessary to make a tender before suit to redeem ;⁹ it is enough to make the offer in the pleading to pay the

amount when it is ascertained.¹⁰ Where the complaint embraced the features of a bill *quia timet*, and also of a bill to redeem, and contemplated the possibility of a balance being found due on the mortgage, demanding such relief as would be agreeable to equity on that state of facts, an offer to pay any balance which might be found due was held to be unnecessary.¹¹ Where a purchaser at sheriff's sale induces the owner of real estate not to redeem, by a promise to hold the property until repaid out of the rents and profits, and then to return the property, the promise is not void under the statute of frauds,¹² and a complaint alleging these facts contains a good cause of action.¹³

1 Lamb v. Jeffrey, 47 Mich. 28. See Boone Mort. § 160.

2 Smith v. Austin, 9 Mich. 465. And see Chamberlin v. Chamberlin, 12 Jones & S. 116.

3 Smith v. Austin, 9 Mich. 465.

4 Dervin v. Jennings, 4 Neb. 97; Carpentier v. Brenham, 50 Cal. 549. See Henley v. Whiffen, 54 Iowa, 555; Walker v. Schreiber, 47 Iowa, 532; Reel v. Wilson, Sup. Ct. Iowa, 19 N. W. Rep. 814.

5 Dervin v. Jennings, 4 Neb. 97, 100.

6 Silsbee v. Smith, 41 How. Pr. 418; 60 Barb. 372; Kemp v. Mitchell, 36 Ind. 249; Anson v. Anson, 20 Iowa, 55.

7 Nesbit v. Hanway, 87 Ind. 400.

8 Nesbit v. Hanway, 87 Ind. 400. And see Kissel v. Eaton, 64 Ind. 248; May v. Fletcher, 40 Ind. 575; Anson v. Anson, 20 Iowa, 55.

9 Coombs v. Carr, 55 Ind. 303.

10 Turner v. Parry, 27 Ind. 163; Lynch v. Jennings, 43 Ind. 276; Ruckle v. Barbours, 48 Ind. 274.

11 Beach v. Cooke, 28 N. Y. 508.

12 See Butt v. Butt, 91 Ind. 305; Rector v. Shirk, 92 Ind. 31.

13 Scheffermeyer v. Schaper, 97 Ind. 70. If the complaint states facts showing that the plaintiff had a right of redemption, and that he was deprived of it by the wrongful act of the defendant, it states a cause of action, and it is not necessary to allege a tender, nor need the complaint contain an offer to pay the amount due: Kling v. Childs, 30 Minn. 366.

§ 193. **Reformation of instrument.**—Generally speaking, reformation of a written instrument may be granted in cases of mutual mistake, and in cases of fraud, and also where there is a mistake on one side and fraud on the other.¹ But where the complaint alleges mistake

and asks relief on that ground alone, the court will not reform the instrument on the ground that one of the parties to it was guilty of a fraud in executing it.² And in asking relief on the ground of mistake, the complaint should point out the mistake, and show in terms what the tenor of the instrument ought to be.³ It must appear that the contract as reduced to writing does not contain what both parties intended it should, and the true contract in its terms should be shown.⁴ So the complaint must show by the facts stated therein that the mistake in question was the mutual mistake of all the parties to the instrument.⁵ And for the want of an allegation that a misdescription in a deed was the result of a mutual mistake by the grantee, as well as by the grantor and draftsman, the complaint was held insufficient on demurrer.⁶ Not only must the fact of a mutual mistake be shown, but also that the party seeking the reformation would be prejudiced by a failure to reform.⁷ But a pleading clearly alleging facts showing a mutual mistake, and which points out with entire certainty in what the mistake consisted, asking for a reformation of the contract, is sufficient, although it does not in so many words aver any mistake.⁸ And under a complaint alleging the facts upon which relief is claimed, and that by mistake of the plaintiff a deed does not contain a reservation in favor of the plaintiff, to which, under the prior contract between the parties, he was entitled, and that the defendant well knew all of the facts, but not charging fraud in words, relief may be given on the ground of fraud.⁹ But the general rule is, that in order to maintain an action to reform an instrument, a mutual mistake, or mistake by one party and fraud by the other, must be averred.¹⁰ And where a complaint is for fraud, the action cannot be maintained on the ground of mutual mistake;¹¹ and *vice*

versa.¹² Where the complaint avers a mistake in the description contained in a conveyance, and the defendant in his answer alleges that he made a mistake in the contract of sale, his failure to allege that there was a mistake also on the part of the plaintiff in the contract renders the matter set up in the answer irrelevant, and it constitutes no defense.¹³ An action may be brought for the reformation of a contract, and for a recovery at the same time, upon the contract when reformed.¹⁴ In an action of an equitable character, wherein a conveyance and bond for re-conveyance are together adjudged to constitute a mortgage, the court may, in order to avoid a multiplicity of actions, decree a foreclosure of the mortgage under a prayer for general relief, although it is not specifically asked for.¹⁵ A plaintiff in an action who is not estopped by the result of a previous action from insisting upon his rights, cannot maintain a new action to reform the pleading in the former.¹⁶

1 *Paine v. Jones*, 75 N. Y. 593; *Albany City Sav. Bank v. Burdick*, 56 How. 500; 87 N. Y. 40; *Jackson v. Andrews*, 59 N. Y. 244; *Humphreys v. Hurtt*, 20 Hun, 398; *Anderson v. Metrop. Life Ins. Co.* 13 N. Y. Week. Dig. 192; *Collins v. Insurance Co.* 17 Ohio St. 215; *DeJarnat v. Cooper*, Sup. Ct. Cal. 13 Cent. L. J. 251. Relief will not be granted on a ground not set up in the pleading: *Cox v. Esteb*, 63 Mo. 110.

2 *Stephens v. Murton*, 6 Oreg. 193.

3 *Stephens v. Murton*, 6 Oreg. 193; *Lamaroux v. Insurance Co.* 3 Duer, 680; *Finch v. Hollinger*, 47 Iowa, 173.

4 *Stephens v. Murton*, 6 Oreg. 193; *Durham v. Insurance Co. Cir. Ct. Oreg.* 5 West C. Rep. 129. And see *Brugger v. State Invest. Co.* 5 Sawy. 310; *Hearne v. Mar. Ins. Co.* 20 Wall. 490; *Humphreys v. Hurtt*, 20 Hun, 398. In an action to reform a deed for an alleged mistake in the description of the land, the complaint is sufficient if it sets out the defective description and the true description, and alleges the mistake: *Ramsey v. Loomis*, 6 Oreg. 367.

5 *Evarts v. Steger*, 5 Oreg. 147; *Durham v. Insurance Co. Civ. Ct. Oreg.* 5 West C. Rep. 129; *Ramsey v. Smith*, 32 N. J. Eq. 28. And see *Syms v. Mayor etc.* 18 Jones & S. 289; *Maghan v. Insurance Co.* 12 Hun, 321; *Berringer v. Schaefer*, 52 How. Pr. 69; *Whittemore v. Farrington*, 12 Hun, 349; 76 N. Y. 452; *Humphreys v. Hurtt*, 20 Hun, 398.

6 *Schoonover v. Dougherty*, 65 Ind. 463. And see *Nelson v. Davis*, 40 Ind. 366; *Nicholson v. Careas*, 59 Ind. 39; *Barnes v. Bartlett*, 47 Ind. 98.

- 7 *Conaway v. Gore*, 24 Kan. 380.
- 8 *Pitcher v. Hennessey*, 43 N. Y. 415.
- 9 *Welles v. Yates*, 44 N. Y. 525.
- 10 *Hay v. Insurance Co.* 77 N. Y. 235; 13 Hun, 496; *Jackson v. Andrews*, 59 N. Y. 244; *Genet v. Del. etc. Canal Co.* 10 N. Y. Week. Dig. 386; 13 N. Y. Week. Dig. 200; *Burley v. Weller*, 14 W. Va. 264. Where the complaint in an action on a policy of insurance sets forth facts showing that the parties were mistaken as to the effect of the language used, the averments authorize a reformation of the contract, though there is no direct allegation of a mistake of fact: *Maier v. Hibernia Ins. Co.* 6 Hun, 353; 67 N. Y. 283.
- 11 *McMichael v. Kilmer*, 76 N. Y. 36; *Leighton v. Grant*, 20 Minn. 245. But see *contra*, *Montgomery v. Shockey*, 37 Iowa, 107.
- 12 *Stephens v. Murton*, 6 Oreg. 193.
- 13 *Kreitz v. Frost*, 5 Abb. Pr. N. S. 277. Compare *Wemple v. Stewart*, 22 Barb. 151.
- 14 *New York Co. v. Insurance Co.* 23 N. Y. 357; *Maier v. Hibernia Ins. Co.* 6 Hun, 353; 67 N. Y. 283; *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628; *Miller v. Davis*, 10 Kan. 541; *Stewart v. Carter*, 4 Neb. 564; *Guernsey v. Ins. Co.* 17 Minn. 104. And see *Halstead v. Board of Commissioners*, 56 Ind. 383.
- 15 *Herring v. Neely*, 43 Iowa, 157.
- 16 *Miles v. Titus*, 2 Abb. N. C. 173.

§ 194. **Rescission and cancellation.** — Where a rescission of a contract is claimed, this must appear by the complaint or petition.¹ The party electing to rescind must offer to return what he has received under the contract, unless it appears that the property is absolutely of no value;² and a complaint which does not allege the restoration of, or an offer to restore, the consideration does not state a cause of action.³ But this rule is held to be applicable only in actions of a legal nature, brought as though the contract had been rescinded;⁴ and the complaint in an action in equity to set aside a contract for fraud need not allege that the plaintiff had tendered back the consideration.⁵ If a party seeks to sustain a contract made with a lunatic, on the ground that it was made in good faith, for the benefit of the lunatic, and without knowledge of his incapacity, and that it has been so far performed that such party cannot be placed in *statu quo*, these facts must be alleged and proved.⁶ In an action to avoid a contract for the sale of

goods and to recover their possession, it is not enough to allege that the defendant, when he purchased the goods, knew that he was hopelessly insolvent and unable to pay for them, and that the plaintiff was wholly ignorant of his insolvency; ¹ it is necessary also to allege that the purchase was made with the intent, on the part of the defendant, to take advantage of his insolvency and not to pay for the goods.² Where the vendor of land brings trespass to try title thereto, thus ignoring his contract to sell, the defendant cannot obtain a decree for rescission of the contract and adjusting equities between the parties, without alleging a valid ground for the rescission of such contract.³ In an action by a grantor in a deed to set aside the instrument on the ground of fraud, an allegation in the complaint that at the time of the execution of the deed the plaintiff was seized in fee simple, and was the owner of the premises described in the deed, is a sufficient allegation of title.⁴

1 *Shults v. Christman*, 6 Mo. App. 338.

2 *Coghill v. Boring*, 15 Cal. 213; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Weed v. Page*, 7 Wis. 503; *Shults v. Christman*, 6 Mo. App. 338; *Coddington v. Wells*, 59 Tex. 40.

3 *Van Liew v. Johnson*, 6 Thomp. & C. 648; 4 Hun, 415; *Anthony v. Day*, 52 How. Pr. 35. And see *Des Moines etc. R. R. Co. v. Alley*, 3 McCrary, 589.

4 *Dusenbury v. Lehmmler*, 46 How. Pr. 417. And see *Hay v. Hay*, 13 Hun, 315; *Kiefer v. Rogers*, 19 Minn. 32; *Martin v. Martin*, 35 Ala. 560.

5 *Dusenbury v. Lehmmler*, 46 How. Pr. 417. And see *Kiefer v. Rogers*, 19 Minn. 32; *Hay v. Hay*, 13 Hun, 315; *Potter v. Taggart*, 54 Wis. 395.

6 *Riggs v. Am. Tract Soc.* 84 N. Y. 330; reversing S. C. 19 Hun, 481; 7 Abb. N. C. 433.

7 *Houghtaling v. Hills*, 59 Iowa, 287.

8 *Houghtaling v. Hills*, 59 Iowa, 287; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573.

9 *Clay v. Hart*, 49 Tex. 433.

10 *Buckholz v. Grant*, 15 Minn. 406. In a suit to set aside a conveyance because of false representations, the plaintiff must allege that he relied upon such representations, and was by them misled to his injury: *Horrell v. Manning*, 6 Oreg. 413. And see *Jones v. Railroad Co.* 79 Mo. 92.

§ 195. **Services—Complaint.**—Under the old system of pleading, the count of *indebitatus assumpsit* for work and labor was always sufficient to authorize a recovery on a contract not under seal, where the plaintiff had fulfilled the contract on his part.¹ And under the Code system of pleading, a party who has wholly performed on his part may count upon the implied assumpsit of the other party to pay the stipulated price, and is not bound to declare specially upon the agreement.² An allegation in a complaint that the defendant was, on a day named, indebted to the plaintiff in a certain sum of money for work and labor before that time, performed for him at his request, states a good cause of action.³ But the rule is otherwise as to a contract not completed, and in such case the plaintiff should set out the special agreement, and allege a partial performance.⁴ If a plaintiff seeks to recover for work and labor performed under a written contract, containing special provisions, the performance of which as conditions precedent he is bound to prove, the contract or its substance must be stated in the complaint, and a compliance with its conditions be distinctly averred.⁵ Where, in an action for services, the complaint sets up a special contract as to the price, and also alleges the value, it is in the sound discretion of the court to require the plaintiff to elect under which allegation he will proceed.⁶ In an action to recover for services rendered under a contract void by the statute of frauds, the plaintiff may be allowed to amend his complaint so as to recover the actual value of the services rendered by him;⁷ this is not substituting a new cause of action, but, in legal effect, conforming the pleadings to the facts.⁸ An allegation in a complaint that one has performed work for another at an agreed price per month, or at an agreed price per day, must

be held to fairly import that the agreement was prior to the performance of the work, and that the work was done in pursuance of it.⁹ It was, however, held that a complaint on an account for labor at a stipulated price per month is insufficient, in the absence of an allegation that the labor was performed.¹⁰ Where the complaint alleges that the defendant agreed to pay the plaintiff a specified sum per day, and the answer does not deny that allegation, no issue is presented by the pleadings as to the value of the plaintiff's services.¹¹ A complaint against a county on an account for services as jailor, which fails to aver that the plaintiff was acting in that capacity, that there was any promise by the county, that a warrant was drawn on the treasury, or that the county is in any way liable for its payment, is bad on demurrer.¹² So a paragraph of complaint against a county board in the form of a common count for work and labor performed in preparing an index is bad on demurrer, unless it avers that the services were rendered on request.¹³

1 See *Dubois v. Del. etc. Canal Co.* 4 Wend. 235.

2 *Hurst v. Litchfield*, 39 N. Y. 377; *Hosley v. Black*, 23 N. Y. 438; *Keteltas v. Myers*, 19 N. Y. 231; *Higgins v. Railroad Co.* 66 N. Y. 604; *Emslie v. Leavenworth*, 20 Kan. 562; *Cincinnati v. Cameron*, 33 Ohio St. 336. But where the plaintiff declares only on the contract, he cannot recover judgment on his *quantum meruit*: *Eyeraman v. Mt. Sinai Cem. Assoc.* 61 Mo. 489. Compare *Ludlow v. Dole*, 1 Hun, 715; 63 N. Y. 617; *Higglus v. Newton etc. R. R. Co.* 3 Hun, 611; 66 N. Y. 604.

3 *Pavisch v. Bean*, 48 Cal. 364. And see *Merritt v. Glidden*, 39 Cal. 564; *Abadie v. Carrillo*, 32 Cal. 172; *Wilkins v. Stidger*, 22 Cal. 231; *Beekman v. Platner*, 15 Barb. 550.

4 *Wolfe v. Howes*, 24 Barb. 174, 666; 20 N. Y. 197; *Atkinson v. Collins*, 9 Abb. Pr. 353; 30 Barb. 430.

5 *Adams v. Mayor etc.* 4 Duer, 295; *Brown v. Colle*, 1 Smith, E. D. 265. Compare *Schencke v. Rowell*, 3 Abb. N. C. 42; *Hosley v. Black*, 26 How. Pr. 97; 23 N. Y. 438.

6 *Hawley v. Wilkinson*, 18 Minn. 525; *Plummer v. Mold*, 22 Minn. 15. See *Usher v. Hiatt*, 18 Kan. 195.

7 *Turnow v. Hochstadter*, 7 Hun, 80. See *Buckingham v. Ludlum*, 37 N. J. Eq. 137.

8 *Turnow v. Hochstadter*, 7 Hun, 80.

9 *Joubert v. Carll*, 26 Wis. 594. See *Nash v. Murnan*, 6 Minn. 577.

10 *Shuttuck v. Griffin*, 44 Tex. 566.

11 *Smith v. Lee*, 10 Nev. 208.

12 *Donalson v. County of San Miguel*, 1 New Mexico, 263.

13 *Hoffman v. Board of Commissioners*, 96 Ind. 84.

§ 196. **Services—Answer.**—In an action to recover for the value of services alleged to have been rendered by the plaintiff, the complaint being in form upon a *quantum meruit*, the defendant, under an answer denying each and every allegation in the complaint, and denying that he is justly indebted to the plaintiff, may prove any circumstances tending to show that he was never indebted at all, or that he owes less than is claimed.¹ Under such general denial he may prove a special agreement as to the rule of compensation;² or negligence, want of skill, or anything which shows that the services were not of the value claimed, is competent under the issue of value.³ But the presumption is that services were performed in an ordinarily skillful manner, and where want of such skill in their performance is alleged as a defense, the burden of proof is on the defendant.⁴ And it is no defense to an action for day wages that the work by the plaintiff was unskillfully done.⁵ An affirmative defense must be pleaded to avail, and neither payment nor an accord and satisfaction can be proven under a general denial.⁶ But where the complaint alleges an amount of indebtedness of the defendant to the plaintiff for services performed, without stating the value of such services nor their extent, but claims that the indebtedness is "for a balance remaining due after sundry payments," the defendant may, under a general denial, prove payments to the plaintiff on account.⁷ The plaintiff's conversion of the thing, in respect of which the services were alleged to have been rendered, cannot be shown under a general denial.⁸ And in an action by an officer

against a city for salary, evidence cannot be introduced under a general denial to show that the employment was in excess of legal authority, or that the fund for the payment of such salary had been exhausted.⁹ In an action to recover for services as a broker, a defense that the broker was acting for both parties in the transaction, without the knowledge of his principals, is not available unless pleaded.¹⁰ A denial of an averment of rendition of services in a certain capacity is not a denial of an averment of recognition and employment in such capacity.¹¹ Where, under the denials in the answer, it is incumbent upon the plaintiff to make out his case, which he can only do by proving an agreement to pay for illegal services, the illegality is an available defense, though not expressly pleaded.¹² To a complaint alleging that the plaintiff performed work, labor, and services for and at the request of the defendant, in printing and advertising, an answer denying that the defendant requested or employed the plaintiff to print or publish the advertisements raises a substantial issue, and cannot be stricken out as frivolous.¹³ In an action to recover the value of work and material, the defendant cannot avail himself under a general denial of an express contract, that the rate of compensation should be submitted to the arbitrament of a third person, from whose decision there should be no appeal;¹⁴ and such contract is not, for the purpose of the trial under a general denial merely, established by any evidence which the plaintiff necessarily introduces for the purpose of proving his case, although such evidence might be sufficient to prove the contract had it been pleaded.¹⁵ In an action in assumpsit for work and labor performed, the defendant having pleaded and proved a statement of the account therefor, and a settlement and payment in full, the plaintiff cannot avoid

the settlement for mistakes in the items of the account settled;¹⁶ this can be done only by an action to surcharge and falsify the account.¹⁷ Where a minor has performed work and labor for another under invalid articles of indenture, purporting to bind the minor to such other person as an apprentice, the performance by the latter of his covenants in such articles is no bar to an action by the former for such work and labor;¹⁸ and an answer in such action setting up such articles and alleging performance of its covenants by the defendant, in bar of such action, is bad on demurrer.¹⁹ A complaint in an action for services which alleges a special contract to pay a specified amount for them, and the rendering of services reasonably worth that amount, states but a single cause of action upon a special contract, and the action is not referable on the ground that it involves the examination of a long account.²⁰

1 Schermerhorn v. Van Allen, 18 Barb. 29; Bridges v. Paige, 13 Cal. 640.

2 Ludlow v. Dole, 1 Hun, 715; 62 N. Y. 617; Blizzard v. Applegate, 61 Ind. 368. Compare Marsh v. Holbrook, 3 Abb. Ct. App. 176.

3 Bridges v. Paige, 13 Cal. 640. But see Krom v. Levy, 1 Hun, 171; 3 Thomp. & C. 704. In an attorney's action for services, it is competent for the defendant to show, under a general denial, any facts tending to disprove the allegations of the complaint that the conditions of the contract have been performed by the plaintiff: Chatfield v. Simonson, 92 N. Y. 209.

4 Robinson v. Campbell, 47 Iowa, 625.

5 Clark v. Fensky, 3 Kan. 389.

6 Dickinson v. Devlin, 14 Jones & S. 232. In an action by an attorney for professional services, the answer may properly set up settlement and payment, and also waiver of lien of the attorney for costs: Lansing v. Ensign, 62 How. Pr. 363.

7 Quin v. Lloyd, 41 N. Y. 340. See § 67, *ante*.

8 Wood v. Belden, 54 N. Y. 638.

9 Brennan v. Mayor etc. 62 N. Y. 365; 1 Hun, 815. See Hartman v. Mayor etc. 23 Hun, 586; Ryan v. Mayor etc. 50 How. Pr. 91.

10 Duryee v. Lester, 11 Jones & S. 564; 75 N. Y. 442.

11 Ryan v. Mayor etc. 10 Jones & S. 202.

12 McKee v. Cheney, 52 How. Pr. 144.

13 Dinsmore v. Mayor etc. 67 Barb. 341; 4 Hun, 643.

14 *Lautenschlager v. Hunter*, 22 Minn. 267.

15 *Lautenschlager v. Hunter*, 22 Minn. 267.

16 *Roach v. Gilmer*, 3 Utah, 389.

17 *Roach v. Gilmer*, 3 Utah, 389.

18 *Tague v. Hayward*, 25 Ind. 427.

19 *Hunsucker v. Elmore*, 54 Ind. 209.

20 *Evans v. Kalbfleisch*, 4 Jones & S. 450; 16 Abb. Pr. N. S. 13.

§ 197. *Services—Loss of—Seduction, etc.*—At common law, the person seduced cannot maintain an action for the seduction.¹ The gist of the action is the loss of service resulting from the act complained of.² The relation of master and servant is assumed to exist, and as a consequence of the wrongful act, the former has been injured by losing the services of the latter, to which he is entitled.³ And to sustain the action, the loss of service must be the direct and immediate, and not a remote consequence of the seduction.⁴ In an action by a father for the seduction of his daughter, a count which avers that she is under twenty-one years of age and unmarried, and was so at the time of the seduction, and that the plaintiff then was and still is entitled to her attentions and services, is a sufficient averment of the relation of master and servant.⁵ It is sufficient to allege, as to loss of services, that the wrongful act was to deprive the plaintiff of them, without alleging ability to perform services, the nature of them, or the actual loss of services.⁶ As it respects averment of relationship, if the complaint alleges "that one F. P., the daughter of the plaintiff, was," etc., it sufficiently avers that F. P. is the daughter of the plaintiff.⁷ And in alleging the seduction, the ultimate fact of seduction need only be averred;⁸ it is not necessary to aver deception, or to set forth the acts made use of to deceive.⁹ An averment that the defendant "debauched and carnally knew," etc., whereby she became pregnant, is tantamount to an averment that the defendant corrupted or

seduced and carnally knew, etc., and is good.¹⁰ In this action, damages for injury to the plaintiff's feelings and sensibility may be recovered under a general allegation of damage, and need not be specially averred.¹¹ But damages for prospective loss of service during minority must be declared on specially.¹² The gist of an action by a husband for enticing away his wife is the loss, without justifiable cause, of her comfort, society, and services;¹³ and the plaintiff must give evidence, both that the loss was not occasioned by the voluntary act of the wife upon justifiable cause, and that it was occasioned by the defendant without any real cause, and in bad faith towards the plaintiff.¹⁴ By statutory provision in many of the States, an unmarried female may now prosecute as plaintiff an action for her own seduction;¹⁵ and may recover damages for loss of health, and all other injuries consequent upon the act of seduction, except injury to or loss of character.¹⁶ The complaint in such action should affirmatively allege that at the time of the seduction charged the plaintiff was an unmarried female.¹⁷ And damages should be clearly alleged as the result or consequence of the seduction.¹⁸ A complaint which shows by its averments that the plaintiff was induced to yield her person to the defendant by the promise of a pecuniary consideration, which he has refused to perform, is bad on demurrer;¹⁹ such a contract being immoral and vicious is against public policy and void.²⁰ The Statute of Limitations does not commence to run against the right of a minor to sue for her own seduction, until she attains her majority.²¹

1 *Hamilton v. Lomax*, 6 Abb. Pr. 142; 28 Barb. 615; *Galvin v. Crouch*, 66 Ind. 56.

2 *Shufelt v. Rowley*, 4 Cowen, 58; *Gillet v. Mead*, 7 Wend. 193; *Applegate v. Ruble*, 2 Marsh. A. K. 128; *Briggs v. Evans*, 5 Fred. 16; *Abrahams v. Kidney* 104 Mass. 222.

3 *Knight v. Wilcox*, 14 N. Y. 413; *George v. Van Horn*, 9 Barb. 523; *Kinney v. Laughenour*, 89 N. C. 363. The real gravamen of the

action is not the loss of service, but the mortification and disgrace of the family and the plaintiff's wounded feelings, and proof of the slightest degree of service is sufficient to establish the relation of master and servant between parent and child: *Moran v. Dawes*, 4 Cowen, 412; *Badgley v. Decker*, 44 Barb. 577; *Ingerson v. Miller*, 47 Barb. 47. And see *Savery v. Crooke*, 52 Wis. 612; 38 Am. Rep. 788; *Davidson v. Abbott*, 52 Vt. 510; 36 Am. Rep. 767.

4 *Knight v. Wilcox*, 14 N. Y. 413. And see *White v. Nellis*, 31 N. Y. 403. Neither pregnancy nor disease is essential to the maintenance of a parent's action for seduction: *White v. Nellis*, 31 N. Y. 403; *Ingerson v. Miller*, 47 Barb. 47; *Leloup v. Eschause*, Abb. An. Dig. (1894) 233.

5 *Clem v. Holmes*, 33 Gratt. 722; *Riddle v. McGinnis*, 22 W. Va. 253.

6 *Clark v. Boyer*, 32 Ohio St. 299; *Hewitt v. Prime*, 21 Wend. 79; *Mulvehall v. Millward*, 11 N. Y. 343. In some States, loss of service as a foundation of the right of the parent to sue has been dispensed with: See Cal. Code Civ. Proc. § 375; Oreg. Code, § 34; Mich. Comp. Laws, § 6165; *Ryan v. Fralick*, 50 Mich. 483.

7 *Parker v. Monteith*, 7 Oreg. 277. And see *Martinez v. Gerber*, 3 Man. & G. 81.

8 *Brown v. Kingsley*, 38 Iowa, 220. The complaint may allege the time of the acts of connection, with a *continuando*, and evidence may be offered for any time covered by the complaint: *Lemmon v. Moore*, 94 Ind. 40.

9 *Brown v. Kingsley*, 38 Iowa, 220; *Rees v. Cupp*, 53 Ind. 566.

10 *Witcell v. Blackford*, 6 Baxt. 141.

11 *Rollins v. Chalmers*, 51 Vt. 592; *Phillips v. Hoyle*, 4 Gray, 568; *Irwin v. Dearman*, 11 East, 22; *Lunt v. Philbrick*, 59 N. H. 59; *McIlvain v. Emery*, 88 Ind. 298.

12 *Gilligan v. Railroad Co.* 1 Smith, E. D. 453. A father cannot maintain an action for debauching his daughter, if he consented to or connived at her intercourse with the defendant: *Smith v. Masten*, 15 Wend. 270. But the consent or connivance of the plaintiff, being a complete bar to the action, must be pleaded as such: *Travis v. Barger*, 24 Barb. 614.

13 *Barnes v. Allen*, 1 Abb. Ct. App. 111.

14 *Barnes v. Allen*, 1 Abb. Ct. App. 111.

15 See Cal. Code Civ. Proc. § 374; *Gray v. Bean*, 27 Iowa, 221; *Thompson v. Young*, 51 Ind. 599; *Ryan v. Fralick*, 50 Mich. 483; *Watson v. Watson*, 49 Mich. 540.

16 *Smith v. Milburn*, 17 Iowa, 30.

17 *Thompson v. Young*, 51 Ind. 599; *Galvin v. Crouch*, 63 Ind. 56; *Dowling v. Crapo*, 65 Ind. 209.

18 *Gray v. Bean*, 27 Iowa, 221.

19 *Wilson v. Ensworth*, 85 Ind. 399.

20 *Wilson v. Ensworth*, 85 Ind. 399; *Johnson v. Holliday*, 79 Ind. 151; *Hogan v. Cregan*, 6 Robt. 138.

21 *Morrell v. Morgan*, Sup. Ct. Cal. 3 West C. Rep. 683.

§ 198. **Sheriff—Complaint.**—A complaint which states that "the plaintiff is sheriff of the city and county of New York," sufficiently shows his official character.¹

He need not set out the facts which show his election and qualification.² In an action against a sheriff, where it is sought to establish a personal and not an official liability, it is not necessary to state the official character of the defendant in the complaint.³ In an action against him for an escape, the complaint must allege that the prisoner was "at large beyond the liberties of the jail," and it is not sufficient to aver that he was at large;⁴ and the fact that the prisoner is indebted to the plaintiff must be distinctly alleged in the complaint in such action.⁵ But a complaint which avers that the defendant wrongfully permitted the debtor to escape is sufficient, where it appears that the debtor went beyond the liberties momentarily, and without the defendant's knowledge.⁶ In an action for not executing process, if the complaint states enough to show jurisdiction to issue process, and then alleges that the process was duly issued, it is sufficient without stating all the steps in the action.⁷ In an action for executing a process valid upon its face, issued out of a court having jurisdiction of the action and of the parties, a general allegation that the process was unlawful and void can have no greater force than a previous recital of the facts, which shows that it was authorized and valid, and a demurrer to such pleading in a complaint will be sustained.⁸ According to the decisions in some of the States, an action cannot be maintained against a sheriff for a failure to return an execution within the time allowed by statute, without alleging and proving that the plaintiff in execution was injured by the neglect, the extent of such injury being the measure of recovery;⁹ but in other States the plaintiff need not allege or prove special damages, and the sheriff may show in mitigation of damages that the defendant in the execution had no property upon which he could

have levied.¹⁰ In Indiana, a complaint which merely alleges the sheriff's failure to return the execution as the ground for damages, is sufficient to authorize the recovery of nominal damages only, as a greater recovery can be had only upon allegations of fact showing special damages.¹¹ In an action upon a sheriff's bond, the complaint averred generally that the sheriff "wrongfully and unlawfully released his levy" upon the property, and in support of this averment, alleged no other facts than that he surrendered the property to the attachment defendant on receiving security in the form prescribed by statute, that said defendant and his surety converted the property, and that both of them are insolvent, and it was held that these facts were insufficient to show a breach of the sheriff's bond.¹² A complaint in an action to recover damages for a trespass in levying void or irregular process need not aver malice or want of probable cause.¹³ Nor is it necessary to aver that a demand had been made upon the sheriff, before commencing an action against him for a failure to pay over the money collected on an execution.¹⁴ And if a sheriff, by virtue of an execution, seizes the property of a person other than the judgment debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand before commencing suit.¹⁵ But it is held, that a demand by a person authorized to make it must be averred and proved in an action against the sheriff and his sureties on the county-levy bond.¹⁶ A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff should allege that the bond was the sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by the sheriff's malfeasance.¹⁷

- 1 *Kelly v. Breusing*, 32 Barb. 601; 33 Barb. 123.
- 2 *Kelly v. Breusing*, 33 Barb. 123.
- 3 *Curtis v. Fay*, 37 Barb. 64; *Hirsch v. Rand*, 39 Cal. 315; *Wymond v. Amabury*, 2 Colo. 213; *Stillman v. Squire*, 1 Denio, 327.
- 4 *Coogrove v. Bowe*, 2 N. Y. Civ. Proc. R. 61. See *Renick v. Orser*, 4 Bosw. 384; *McCreary v. Willett*, 4 Bosw. 643; 9 Bosw. 600; 23 How. Pr. 129.
- 5 *Coogrove v. Bowe*, 2 N. Y. Civ. Proc. R. 61.
- 6 *Dunford v. Weaver*, 84 N. Y. 445; 21 Hun, 349.
- 7 *French v. Willett*, 10 Abb. Pr. 99; *Wehle v. Conner*, 9 Jones & S. 201; *First Nat. Bank v. Rogers*, 13 Minn. 407.
- 8 *Clark v. Bowe*, 60 How. 98. The rule is, that a specific statement of facts will prevail against a general statement: *Conaughy v. Nichols*, 42 N. Y. 83; *Lange v. Benedict*, 73 N. Y. 12, 30.
- 9 *Musser v. Maynard*, 55 Iowa, 197; *Nash v. Whitney*, 39 Me. 341; *Commonw. v. Lelav*, 1 Phila. 353. And see *Dennis v. Whetham*, Law R. 9 Q. B. 345.
- 10 *Ledyard v. Jones*, 7 N. Y. 550. And see *Evans v. House*, 26 Ohio St. 483; *Moore v. Floyd*, 4 Oreg. 101; *Roth v. Duvall*, 1 Idaho, 149; *Clough v. Monroe*, 34 N. H. 381.
- 11 *State v. Blanch*, 70 Ind. 204. And see *State v. Hammond*, 72 Ind. 472.
- 12 *Wheeler v. McDill*, 51 Wis. 356. See § 127, *ante*.
- 13 *Sprague v. Parsons*, 14 Abb. N. C. 320. A process being void, the party who sets it in motion and all who aid him are trespassers: *Wehrer v. Haviland*, 4 Daly, 550; 42 How. Pr. 399; *Day v. Bach*, 87 N. Y. 50.
- 14 *Pope v. Hays*, 1 Mo. 450; *Dygart v. Crane*, 1 Wend. 534. And see *Grandstaff v. Ridgely*, 33 Gratt. 1.
- 15 *Ledley v. Hays*, 1 Cal. 160; *Boulware v. Craddock*, 30 Cal. 190; *Wellman v. English*, 33 Cal. 533; *Hicks v. Cleveland*, 48 N. Y. 84; *Kluender v. Lynch*, 2 Abb. Ct. App. 538; *Owings v. Frier*, 2 Marsh. A. K. 283; *Jamison v. Hendricks*, 2 Blackf. 94. But see *Vose v. Stickney*, 8 Minn. 75; *Barry v. McGrade*, 14 Minn. 163; *Butler v. White*, 25 Minn. 432.
- 16 *Commonw. v. Williams*, 14 Bush, 297.
- 17 *Ghiradelli v. Bourland*, 32 Cal. 585.

§ 199. *Sheriffs—Answer.*—In an action against a sheriff for failing to levy upon property, it may be shown in defense that the property was exempt from levy and sale, but in order to avail as a defense, such exemption must be affirmatively shown.¹ The answer should affirmatively show that the property was not greater in quantity or value than the exemption allowed by law.² In an action against a sheriff for levying upon exempt property, if the defendant relies upon a waiver by the plaintiff of his right of exemption, he must plead

such waiver.¹ In answer to a rule against a sheriff for neglect of duty in levying upon and selling property, he may show that the execution has been paid off in whole or in part, and thereby that the plaintiff has not been injured by his default to the extent claimed, and it is error to strike out such answer on demurrer.² In order to justify the seizure of property in the possession of a stranger to the writ which he has executed, the sheriff must plead specially such justification;³ and he cannot justify under a general denial of the allegations of the complaint.⁴ In an action against a sheriff for an escape, evidence that the judgment debtor would have voluntarily returned into custody prior to the commencement of the action, had he not been prevented by the fraudulent act of the plaintiff, is inadmissible, unless such ground of defense is alleged in the answer.⁵ In an action against a sheriff and his sureties, upon the sheriff's bond, for a failure of the sheriff to advertise and sell the property of the execution debtor, an answer that the failure to advertise and sell was pursuant to the direction of the plaintiff's attorney is sufficient.⁶ If the sheriff fails to execute process within an apparently reasonable time, the burden is upon him, in an action against him for damages for such failure, to allege and prove circumstances showing that the delay was not in fact unreasonable.⁷ In an action against a sheriff for a false return, he may set up and prove on the trial the reversal of the judgment on which the execution was issued.¹⁰

1 Terrell v. Grubbs, 66 Ind. 570.

2 Wheeler v. Redding, 55 Ga. 87.

3 Murphy v. Sherman, 25 Minn. 196.

4 Wheeler v. Thomas, 57 Ga. 161.

5 Glazer v. Clift, 10 Cal. 303. And see Towdy v. Ellis, 22 Cal. 650; Richardson v. Smith, 29 Cal. 529; Knox v. Marshall, 19 Cal. 617; Dennis v. Snell, 54 Barb. 411; 34 How. Pr. 467; Werner v. Waters, 55 Barb. 591; Davis v. Bush, 4 Blackf. 330.

6 Glazer v. Chitt, 10 Cal. 303.

7 Richtmeyer v. Remsen, 38 N. Y. 206.

8 State v. Boyd, 63 Ind. 423.

9 Elmore v. Hill, 46 Wis. 613.

10 Inman v. McNeill, 57 How. Pr. 151. See Earl v. Camp, 16 Wend. 568; Allen v. Ward, 8 Mass. 79. In an action to recover for alleged false returns of several executions, the mere issuing of a prior execution is no defense in itself: Johnson v. Reilly, 59 How. Pr. 354.

§ 200. Slander — Of title. — There is said to be no substantial difference between an action for slander of a title to property, and an action for slander of the person, when, in the latter instance, the words are actionable only on the ground of the special damage which has resulted.¹ To maintain an action for slander of title, it is necessary for the plaintiff to show either a title or an interest in the property.² Special damages must be alleged;³ and the action cannot be maintained without averring malice,⁴ and want of probable cause.⁵ If the special damage caused by slander of title was the loss of a sale or loan, it is essential to name the person or persons who refused, for that cause, to loan or purchase;⁶ and if not named, the complaint is demurrable.⁷ Delay in consummating a sale, or a general depreciation of value, as a consequence of slander of title, is not enough to sustain the action, but the loss of a purchaser must be alleged.⁸ In an action for slander of title, the defendant, by setting up title in himself to the property, stands in the position of a plaintiff in a petitory action, and must make out his case.⁹

1 Andrew v. Deshler, 43 N. J. L. 16, 19. See § 164, *ante*.

2 Edwards v. Burris, 60 Cal. 157; Smith v. Spooner, 3 Taunt. 246; Hargrave v. Le Breton, 4 Burr. 2422.

3 Bailey v. Dean, 5 Barb. 297; Stark v. Chetwood, 5 Kan. 141; Like v. McKinstry, 41 Barb. 186; 3 Abb. Ct. App. 62; Kendall v. Stone, 5 N. Y. 14.

4 Kendall v. Stone, 5 N. Y. 14; Hovey v. Rubber Tip Pencil Co. 57 N. Y. 119; McDaniel v. Baca, 2 Cal. 328. Malice is of the gist of the action: Andrew v. Deshler, 43 N. J. L. 167.

5 Stark v. Chetwood, 5 Kan. 141. But see Like v. McKinstry, 3 Abb. Ct. App. 62.

6 *Linden v. Graham*, 1 Duer, 670; *Bulley v. Dean*, 5 Barb. 297. See *Weir v. Allen*, 51 N. H. 177.

7 *Linden v. Graham*, 1 Duer, 670.

8 *Bonanza Development Co. v. Hayes*, 5 N. Y. Month. Law Bull. 28.

9 *Clarkston v. Vincent*, 32 La. An. 613; *Gay v. Ellis*, 33 La. An. 249; *Dalton v. Wickliffe*, 35 La. An. 353.

§ 201. **Specific performance—Complaint.**—The complaint in an action for specific performance of a contract to convey land, should allege not only a legal contract to convey, but also facts entitling the grantee to a deed under it, such as performance or a readiness and willingness to perform its conditions.¹ The complaint must show the contract, including consideration, date, terms, and stipulations.² If the contract was made by an agent, it is unnecessary to set forth the manner of its execution, or anything more than the fact of the execution, and the contract must then be proved as a valid one.³ An allegation in the complaint that the plaintiff offered to perform on his part, and that the defendant refused, etc., is held to be sufficient.⁴ But an averment that the plaintiff has been ready and willing, and has offered to accept a conveyance according to the agreement, and to pay the balance of the purchase money, is not an averment that he tendered the purchase money.⁵ But an offer in his complaint to bring the money into court, for the use of the defendant, whenever the amount shall be ascertained, and he has a decree for performance, is a sufficient tender.⁶ And the complaint need not aver a tender of performance by the plaintiff, if it be averred therein that the defendant had expressly repudiated the contract and given notice of his refusal to perform.⁷ One who seeks the specific performance of an oral agreement, relying upon the peculiar power of a court of equity to enforce his claim, must allege in his complaint the requisite equitable facts and circum-

stances relied upon to avoid the bar of the statute of frauds, and to give the court jurisdiction.⁸ But his complaint need not aver an agreement to convey, if it allege facts from which the law will imply such an agreement, and also facts which take the case out of the statute.⁹ A party who claims to have fully performed an oral agreement to exchange lands for other property, must show a definite contract to that effect and its terms, such a part performance on his part that its rescission would be a fraud upon him, and the delivery of possession in pursuance of the contract.¹⁰ In an action for specific performance of a covenant of renewal, the plaintiff is not bound to show performance of a simple covenant to pay rent and taxes, or tender of any sums due thereunder; ¹¹ it is enough if the complaint contains an offer to perform, and the decree provides for such performance as a condition.¹² In an action for specific performance, it is held that damages may be awarded in lieu thereof, under a prayer asking for such order or decree, as the court might direct.¹³ But it seems that an action for specific performance cannot be retained as one for the recovery of damages, after it has been determined that a specific performance cannot be adjudged, unless a cause of action for the recovery of damages was alleged or set forth in the complaint.¹⁴ A complaint against the heirs of a deceased vendor, for a specific performance of his parol contract, need not allege that the ancestor had any title to the property which he agreed to convey.¹⁵

1 *Jenks v. Parsons*, 2 Hun, 667. And see *Richards v. Edick*, 17 Barb. 240; *Chess' Appeal*, 4 Pa. St. 52; 45 Am. Dec. 663; *Frixen v. Castro*, 53 Cal. 442. If it appear from the general framework of the complaint that the action is for specific performance, it will be so considered, though the complaint be obnoxious to criticism for want of perspicuity: *Heimlen v. Martin*, 53 Cal. 321.

2 *Gaskins v. Peebles*, 44 Tex. 300. And see *Williams v. Stewart*, 25 Minn. 516; *Lanz v. McLaughlin*, 14 Minn. 72. The complaint must set forth fully the nature and character of the consideration, and an allegation that the consideration was fair and reasonable is insufficient: *Mayger v. Cruse*, Sup. Ct. Mont. 6 West C. Rep. 68.

3 *Hanchett v. McQueen*, 32 Mich. 22; *Harding v. Parshall*, 56 Ill. 210.

4 *St. Paul Division v. Brown*, 9 Minn. 157.

5 *Englander v. Rogers*, 41 Cal. 220. And see *Dustin v. Newcomer*, 8 Ohio, 43.

6 *Lynch v. Jennings*, 43 Ind. 276; *Hunter v. Bales*, 24 Ind. 299; *Fall v. Hazelrigg*, 45 Ind. 578; *Irvine v. Gregory*, 13 Gray, 215.

7 *Brown v. Eaton*, 21 Minn. 407; *Martin v. Merritt*, 57 Ind. 34; *Gray v. Dougherty*, 25 Cal. 283; *Deichmann v. Deichmann*, 49 Mo. 107; *Brock v. Hidy*, 13 Ohio St. 306.

8 *Marie v. Garrison*, 13 Abb. N. C. 215, 321; *Hart v. McClellan*, 41 Ala. 251; *McCaffrey v. Woodin*, 63 N. Y. 463. And see *Green v. Jones*, 76 Me. 563.

9 *Drum v. Stevens*, 94 Ind. 181.

10 *McPherson v. Wiswell*, 16 Neb. 625.

11 *Crosby v. Moses*, 16 Jones & S. 146.

12 *Crosby v. Moses*, 16 Jones & S. 146.

13 *Hamilton v. Hamilton*, 59 Mo. 232; *Gibbs v. Champion*, 3 Ohio, 335. See *Lowber v. Cunit*, 36 Wis. 176.

14 *Wilder v. Ranney*, 16 N. Y. Week. Dig. 478. Compare *Sternberger v. McGovern*, 56 N. Y. 12; *Beck v. Allison*, 56 N. Y. 363.

15 *Cottrell v. Cottrell*, 81 Ind. 87. In a suit for a specific performance, the court may, if the circumstances warrant it, allow the plaintiff, by amendment, to ask for a rescission of the contract: *Ferry v. Clarke*, 77 Va. 397.

2 202. **Specific performance—Answer.**—Where the defendant, in his answer to an action for the specific performance of a contract for the sale of land, sets up a contract essentially different from that stated in the complaint, the latter, if by parol, cannot be specifically enforced.¹ The rule of pleading in such cases is, that if the defendant admits the making of a contract, and sets out its terms, his answer will be sufficient, although it omits to set up the statute of frauds as a bar.² In an action to enforce specific performance, the defendant cannot, except by consent or specially pleading the facts, assert the defense that the land was his homestead, that he was a married man, and that his wife did not join in the contract;³ mere denial of the execution of the deed will not authorize such proof.⁴ An answer in an action for specific performance, or to correct an alleged mistake in a deed, which avers that "the defend-

ant has conveyed all the land he agreed to convey," raises an important issue, and is not sham pleading.⁵

1 *Haight v. Child*, 34 Barb. 186.

2 *Haight v. Child*, 34 Barb. 186. But see *Harris v. Knickerbacker*, 5 Wead. 638; *Duffy v. O'Donovan*, 46 N. Y. 233; § 68, *ante*.

3 *Brown v. Eaton*, 21 Minn. 409.

4 *Brown v. Eaton*, 21 Minn. 409.

5 *Young v. Phifer*, 72 N. C. 529. The doctrine is well established, that if the evidence be conflicting, and it is not clear that a contract was in fact made, a complaint for specific performance will be dismissed: *Suydam v. Columbus Ins. Co.* 18 Ohio, 459; *Williams v. Stewart*, 25 Minn. 516; *Dinning v. Phoenix Ins. Co.* 68 Ill. 414; *Stearns v. Beckham*, 31 Gratt. 379; *Haskin v. Ins. Co.* 78 Va. 700.

§ 203. **Subscriptions.**—As a general rule, in the absence of legislation and express agreement on the subject, assessments on subscriptions to the capital stock of a corporation cannot be enforced until the whole amount of stock has been subscribed.¹ In an action on a contract of subscription containing a condition precedent, as, for instance, that a certain amount of the stock shall be subscribed for, the plaintiff must allege in his complaint that the requisite amount of stock has been subscribed, or he must aver all the facts necessary to show a waiver of the condition precedent, and to fix the defendant's liability, notwithstanding the non-performance.² So, the complaint in an action to collect a stock subscription must show that the corporation is authorized to have a capital stock and to take subscriptions to the same,³ and should aver a tender of the stock to the defendant.⁴ But in an action upon an unconditional promise to pay a subscription, it is unnecessary to aver that the requisite amount of capital stock had been subscribed, as provided by charter.⁵ And if the action is to recover part of a subscription only, issuance and tender of the stock need not be averred.⁶ In the case of a subscription with a condition attached, it is not necessary to aver that the subscriber was notified of the acceptance of his subscription, it being sufficient if the

complaint avers that he had notice of the performance of the condition.⁷ But in an action on bonds issued to pay a subscription by a county to a railroad company, it is held that every essential element of the power given to the county to make such a subscription must be stated in the complaint or petition;⁸ and until both a subscription by the county and its acceptance by the company occur, there is no contract, and such acceptance should be shown.⁹ In an action upon a railroad subscription, conditioned to be paid as called for by the directors, provided the same should be expended upon a certain line of road to be thereafter located, a complaint which fails to show either that the road was constructed along the line designated, or an offer or readiness to expend the money subscribed, according to the condition, is defective.¹⁰ Where a complaint avers that directors of a railroad corporation had been duly elected in pursuance of notice, it is to be presumed that the requisite amount of stock had been subscribed to authorize such election, and also to authorize the location of the road and the making of assessments.¹¹ A corporation which, by statute, has power to receive subscriptions before proceeding to organize by electing officers, may, as a necessary consequence, bring suit thereon before being organized.¹² In an action by a corporation to recover an unpaid assessment, the complaint should aver that an assessment was ordered agreeably to the act and by-laws, and should also allege the time when it was ordered to be paid.¹³ An allegation that, calls for unpaid installments were "duly made," is held to be a sufficient averment that they were made in conformity with the statute.¹⁴

1 *Hughes v. Antietam etc. Manuf. Co.* 34 Md. 316; *Peoria etc. R. R. Co. v. Preston*, 55 Iowa, 115; *Jewett v. Valley Railw. Co.* 34 Ohio St. 601; *Emmitt v. Springfield etc. R. R. Co.* 31 Ohio St. 23.

2 Fry v. Railroad Co. 2 Met. (Ky.) 314; Estabrook v. Omaha Hotel Co. 5 Neb. 76; Livesey v. Omaha Hotel Co. 5 Neb. 50, 75; 8 Am. Corp. Cas. 312; Topeka Bridge Co. v. Cummings, 3 Kan. 55.

3 Minneapolis Harvester Works v. Libby, 24 Minn. 327.

4 St. Paul etc. Railw. Co. v. Robbins, 23 Minn. 439.

5 Lall v. Mt. Sterling Coal Road Co. 13 Bush, 32.

6 Minneapolis Harvester Works v. Libby, 24 Minn. 327, 329. An agreement to take corporate stock necessarily implies a promise on the part of the subscriber to pay for it, and the promise need not be alleged: Mansfield etc. R. R. Co. v. Brown, 28 Ohio St. 234. And see Lemon v. Chauslor, 68 Mo. 340; Allen v. Patterson, 7 N. Y. 478. A subscriber, by accepting the stock and paying an assessment thereon, estops himself from denying the existence and validity of the contract of subscription: Inter Mountain Pub. Co. v. Jack, Sup. Ct. Mont. 5 West C. Rep. 703. And see Athol Music Hall Co. v. Corey, 116 Mass. 471.

7 Ashtabula etc. R. R. Co. v. Smith, 15 Ohio St. 323.

8 Well v. Greene County, 69 Mo. 281.

9 Well v. Greene County, 69 Mo. 281. And see Aspinwall v. Commissioners etc., 22 How. 379; Nugent v. Supervisors, 19 Wall. 241; Inter Mountain Pub. Co. v. Jack, Sup. Ct. Mont. 5 West C. Rep. 703; Griswold v. Sellman, 72 Mo. 110; 8 Am. Corp. Cas. 247.

10 Trott v. Sarchett, 10 Ohio St. 241.

11 Ashtabula etc. R. R. Co. v. Smith, 15 Ohio St. 323.

12 Oregon Cent. R. R. Co. v. Scoggin, 3 Oreg. 161. A subscription to the capital stock of a corporation to be thereafter organized becomes a valid contract, binding upon the subscriber, upon the acceptance by him of the shares subscribed for: Inter Mountain Pub. Co. v. Jack, Sup. Ct. Mont. 5 West C. Rep. 703.

13 Atlantic Mut. Ins. Co. v. Young, 38 N. H. 451. And see Williams v. Lakey, 15 How. Pr. 206; Gebhart v. Junction R. R. Co. 12 Ind. 484; Mansfield etc. R. R. Co. v. Hall, 28 Ohio St. 310.

14 Bavington v. Railroad Co. 34 Pa. St. 353. A stockholder sued for the amount of an assessment upon his subscription will not be allowed to dispute the necessity of the assessment: Judah v. American Live Stock Assoc. 4 Ind. 333; Choteau Ins. Co. v. Floyd, 74 Mo. 286; 8 Am. Corp. Cas. 233. And it seems a stockholder cannot defeat an assessment by evidence that he subscribed to the stock in reliance upon representations of an agent of the corporation that certain persons, in whom he had confidence, were stockholders, such persons not being *bona fide* stockholders: Choteau Ins. Co. v. Floyd, 74 Mo. 286; 8 Am. Corp. Cas. 233. Compare Selma etc. R. R. Co. v. Anderson, 31 Miss. 829; 8 Am. Corp. Cas. 27.

§ 204. **Sureties — Complaint.** — The complaint in a suit or action by one surety against another for contribution should set forth the facts out of which his contribution arises, depending, of course, upon the circumstances of the particular case.¹ The complaint should show the common obligation of the parties as sureties, the payment of the debt by the plaintiff, and an applica-

tion to the defendant for the payment of his share.² Though, according to some of the decisions, the action will lie without alleging or proving a previous notice of the payment by the plaintiff, or a demand on the defendant for contribution.³ The right of action is held to accrue from the time of payment, without either demand or notice.⁴ Nor is it necessary to allege that payment was made under compulsion of a suit.⁵ In an action against sureties upon the official bond of a county treasurer, the performance of the duties enjoined by statute upon the county commissioners may be alleged in the manner provided for pleading the performance of conditions precedent in a contract;⁶ and an allegation "that the county commissioners complied with all the requirements and conditions imposed upon them by the terms of the bond, and the requirements of all acts of the legislature pertaining to the duty of county commissioners relating to county officers and to their official bonds," is sufficient.⁷

1 See *Van Demark v. Van Demark*, 13 How. Pr. 372; *Harris v. Douglass*, 64 Ill. 466; *Jones v. Blanton*, 6 Ired. Eq. 115; *Bachelor v. Fiske*, 17 Mass. 464.

2 *Sherrod v. Woodard*, 4 Dev. 360, 363.

3 *Parham v. Green*, 64 N. C. 436; *Chaffee v. Jones*, 19 Pick. 260; *Wood v. Perry*, 9 Iowa, 479. But see *Sherrod v. Woodard*, 4 Dev. 360, 363; *Nelson v. Fry*, 16 Ohio St. 552.

4 *Wood v. Perry*, 9 Iowa, 479.

5 *Linn v. McClelland*, 4 Dev. & B. 458. And see *Camp v. Bostwick*, 20 Ohio St. 337; 5 Am. Rep. 669.

6 *County of White Pine v. Herrick*, Sup. Ct. Nev. 5 West C. Rep. 135.

7 *County of White Pine v. Herrick*, Sup. Ct. Nev. 5 West C. Rep. 135. Compare *Himmelman v. Danos*, 35 Cal. 441; *People v. Jackson*, 24 Cal. 630. Where a demand is necessary to fix the liability of sureties on an undertaking, it is parcel of the contract, and must be made before the commencement of an action for the breach of the undertaking, and in the action itself must be averred and proved: *Morgan v. Menzies*, Sup. Ct. Cal. 2 West C. Rep. 832.

2 205. **Sureties — Answer.** — A valid agreement to extend the time for the payment of a note, entered into

between the maker and the holder, without the knowledge or consent of the surety, will operate to discharge the liability of the latter;¹ but an unperformed, usurious agreement for extension of time does not have such effect.² And extension of time, to avail as a defense, must be set up in the answer,³ in accordance with the rule that new matter, which is simply an avoidance of the cause of action made out by the plaintiff, should always be specially pleaded.⁴ But an answer which alleges an extension of time to the principal debtor, without the consent of the surety, for a binding and valuable consideration, is sufficient without alleging the time for which the extension was granted, by whom it was to be given, or the precise consideration paid.⁵ An allegation in an answer by a surety "that the defendant is informed and believes that the time of payment of said note was extended," etc., is not, however, a sufficient allegation of the fact of extension.⁶ It is the general rule that mere delay by a creditor to proceed against the principal will not exonerate the surety, notwithstanding loss may have resulted from the delay;⁷ in order that such delay shall discharge the surety, he must show explicit notice, or a request to the creditor to take legal proceedings to collect the debt, or enforce the liability of the principal.⁸ But an averment in his answer that he had requested the plaintiff to sue the maker is held to be sufficient, without the further allegation that the request was in writing, although the statute requires it to be in writing;⁹ it is sufficient if the pleading alleges the fact of notice, and then it must be shown by the evidence that the statute has been complied with.¹⁰ And where the undertaking of a surety is of such a nature that proceedings must be taken against his principal before the obligation of the surety to pay arises, the law im-

plies a condition that due diligence shall be used in proceeding against the principal;¹¹ and in an action against the surety upon his undertaking, no proof of a request to proceed against his principal, or of damage to the surety from refusal or neglect to comply with the request, need be given by the surety to establish his defense.¹² A surety may plead as a defense to a promissory note that usurious interest was agreed upon by the parties at the time of the execution of the note;¹³ and although such plea be defective in its statement of facts, yet if testimony is introduced without objection, showing the existence of a contract for illegal interest, the court, after verdict, will permit the answer to be amended to conform to the facts proved.¹⁴ And the defenses of usury, extension of time, and payment, are not inconsistent, and may be set up in an answer of a surety on a promissory note.¹⁵ An extension of time to one of the sureties to a contract, does not discharge a co-surety from the entire debt, but only from such part thereof as the former would be bound to contribute to its payment.¹⁶ A *prima facie* case for contribution is made when it is shown that one of two joint debtors had paid more than a moiety of the debt;¹⁷ and facts which rebut the presumed equity to contribute should be set up by way of defense, and need not be negatived in a complaint for contribution.¹⁸

1 Denick v. Hubbard, 27 Hun, 347; Church v. Malloy, 70 N. Y. 63; Willis v. Davis, 3 Minn. 28. See Mullendore v. Wertz, 75 Ind. 431; 39 Am. Rep. 155.

2 Thayer v. King, 31 Hun, 437; Fernan v. Doubleday, 3 Lans. 216; Halstead v. Brown, 17 Ind. 202; Tudor v. Goodloe, 1 Mon. B. 324; Smith v. Hyde, 36 Vt. 306.

3 Newell v. Salmons, 22 Barb. 647.

4 Horton v. Ruhling, 3 Nev. 498, 504.

5 Huey v. Pinney, 5 Minn. 310. And see Costello v. Wilhelm, 13 Kan. 229; Ready v. Sommer, 37 Wis. 265.

6 Baskin v. Godbe, 1 Utah, 28.

7 Newcomb v. Hale, 90 N. Y. 326; Thayer v. King, 31 Hun, 437.

8 *Thayer v. King*, 31 Hun, 437; *Howe Machine Co. v. Harrington*, 82 N. Y. 121; *Denick v. Hubbard*, 27 Hun, 347.

9 *Coats v. Swindle*, 55 Mo. 31. But see *contra*, *Headington v. Neff*, 7 Ohio, 223.

10 *Coats v. Swindle*, 55 Mo. 31, 33.

11 *Toles v. Adeo*, 91 N. Y. 562; 16 N. Y. Week. Dig. 537. And see *Northern Ins. Co. v. Wright*, 76 N. Y. 445.

12 *Toles v. Adeo*, 91 N. Y. 563; 16 N. Y. Week. Dig. 537.

13 *Keim v. Avery*, 7 Neb. 54.

14 *Keim v. Avery*, 7 Neb. 54.

15 *Shed v. Augustine*, 14 Kan. 282.

16 *Ide v. Churchill*, 14 Ohio St. 372, 386; *Klingensmith v. Klingensmith*, 31 Pa. St. 460.

17 *Gaster v. Waggoner*, 26 Ohio St. 450. See *Wells v. Miller*, 68 N. Y. 253; *Hitchboon v. Fletcher*, 66 Me. 210; *Newcomb v. Gibson*, 127 Mass. 338; *Van Winkle v. Johnson*, 11 Oreg. 463.

18 *Gaster v. Waggoner*, 26 Ohio St. 450.

§ 206. **Taxes—Taxation.**—An action to enforce the collection of a tax will not lie against a tax-payer without a previous demand, or the publication of notice equivalent thereto, and a demand of the tax and default of payment must be alleged.¹ But when taxes are paid under protest, no demand is necessary before suit to recover back the money so paid, the protest itself being sufficient notice that the tax-payer regarded the tax as illegal, and that he would enforce his rights, if need be, by an appropriate proceeding.² To justify the recovery back of the money paid, where payment was made in satisfaction of an assessment which is void, the payment must be shown to have been involuntary, that is, compulsory from coercion either in fact or by law.³ But a complaint which sets out the facts that the assessment was void and had been so declared, and that the payment of it was made under a threat that the plaintiff's property would be sold if it were not paid, would seem to state a complete right of action.⁴ A complaint in an action to enjoin the collection of taxes, which does not show a payment or unconditional tender of so much of the tax as is conceded, or can be shown to be

properly due, does not present any equity sufficient to justify either preliminary or final relief.⁵ A cause of action for the recovery of taxes alleged to have been illegally paid under protest, and one for an injunction to restrain the collection of taxes assessed for a different year, do not fall within a class that may properly be united in the same complaint, the one being a legal and the other an equitable cause of action, and not arising out of the same transaction.⁶ A complaint in an action to recover delinquent taxes, which enumerates the property in words identical with those in the assessment book, is sufficient;⁷ but merely stating the property assessed as personal property, is insufficient under a statute which requires that the officer designated to bring the action should state in the complaint "the kind and quantity of the property assessed."⁸ Where, in order to show a liability on the part of a county to a purchaser of land at a tax sale, a statute requires it to appear that the sale has failed through some "mistake, or wrongful act of the county treasurer or other officer" of the revenue, the complaint, to state a cause of action, must set out the particular act done or omitted, and the officer doing or omitting it.⁹ A complaint to enforce a ditch assessment made under the Indiana statute, is not good as a complaint in assumpsit, which neither avers that the defendant requested the work done, nor that he promised to pay for it.¹⁰ In an action under the Wisconsin statute to foreclose a tax certificate, the complaint need not set out the proceedings antecedent to the certificate, nor allege that no proceedings at law for the same purpose have been taken.¹¹ Under the New York statute, giving an action to tax-payers against certain officers to prevent waste or injury, a complaint which alleges that the plaintiff's were, as residents and tax-payers of a town, liable to assessment and taxation

therein, and were residents and tax-payers and owners of property liable to assessment and taxation therein at the time of the occurrences mentioned in the complaint, is sufficient.¹² A complaint in an action to remove an assessment as a cloud on title is sufficient if one ground for the relief is good, although another be bad.¹³ A complaint in such action, charging a failure of the commissioners to act on the award made, a fraudulent and unlawful suppression of their report, that they fraudulently procured the appointment of other commissioners of awards, and that the record falsely and fraudulently shows otherwise, states a good cause of action.¹⁴ A complaint in a tax suit which fails to show that the property was assessed to any particular party whose duty it was to pay the taxes, or that it was made to unknown owners, does not state facts sufficient to constitute a cause of action.¹⁵ So of a complaint in an action by a judgment creditor against a tax collector for taking property held by the sheriff under his execution, which fails to allege the insolvency of the judgment debtor.¹⁶ But a complaint in an action against a city for the recovery back of taxes illegally assessed and collected, is not open to demurrer on the ground that the tax was for city, county, and State purposes, if there was an allegation that the defendant held the whole amount illegally collected.¹⁷ Where a statute provides that taxes which have been remitted by the board of supervisors shall be exempt from its provisions, it need not be averred in the complaint that the taxes sued for have not been remitted, but that fact, if it exist, should be pleaded in bar of the action.¹⁸

1 *St. Anthony etc. Co. v. Greely*, 11 Minn. 325; *Thompson v. Gardner*, 10 Johns. 404. It is within the power of the legislature to define by law the grounds upon which a party sued for his taxes may set up a defense: *People v. Wilkerson*, 1 Idaho, 619.

2 *Board of Commissioners v. Cutter*, 3 Colo. 349; *Look v. Inhabitants of Industry*, 51 Me. 375.

- 3 *Peyser v. Mayor etc.* 70 N. Y. 502; *Marsh v. City of Brooklyn*, 59 N. Y. 290; *Stuart v. Palmer*, 74 N. Y. 183; *Georgetown College v. District of Columbia*, 4 McAr. 43; *Babcock v. Fond du Lac*, 58 Wis. 230.
- 4 *Beucher v. Village of Port Chester*, 31 Hun, 550, 557.
- 5 *Huntington v. Palmer*, 7 Sawy. 355. And see *National Bank v. Kimball*, 102 U. S. 733; *Wilson v. Longendyke*, Sup. Ct. Kan. 4 *Pacif. L. Rep.* 361; 32 Kan. 267; *Frazer v. Seibern*, 18 Ohio St. 614; *City of Ottawa v. Barney*, 10 Kan. 270.
- 6 *Turner v. Althaus*, 6 Neb. 54, 66.
- 7 *San Francisco v. Flood*, 64 Cal. 504. And see *People v. McCreery*, 34 Cal. 434; *People v. Sneath*, 28 Cal. 612; *Falkner v. Hunt*, 16 Cal. 137; *State v. Mining Co.* 1 Nev. 523. The rule as to the degree of certainty required in describing personality in assessments for taxation is, that the description shall be such that tax-payers may know for what they are to be taxed: *People v. Home Ins. Co.* 29 Cal. 549; *Monroe v. Town of New Canaan*, 43 Conn. 812.
- 8 *People v. Holladay*, 25 Cal. 300.
- 9 *Kaelser v. Nuckolls County*, 14 Neb. 277.
- 10 *Boatman v. Macy*, 82 Ind. 490; *Bogart v. Castor*, 87 Ind. 244. See *Albertson v. State*, 95 Ind. 370.
- 11 *Durbin v. Platto*, 47 Wis. 484.
- 12 *Ayers v. Lawrence*, 59 N. Y. 192. See N. Y. Code Civ. Proc. § 1925; *Hull v. Ely*, 2 Abb. N. C. 440; *Lutes v. Briggs*, 64 N. Y. 404; *Hills v. Peekskill Sav. Bank*, 26 Hun, 161; *People v. New York etc. Co.* 84 N. Y. 585; *Bird v. Mayor etc.* 33 Hun, 396.
- 13 *Boyle v. City of Brooklyn*, 71 N. Y. 1.
- 14 *Dederer v. Voorhies*, 81 N. Y. 153.
- 15 *People v. DeCarrillo*, 35 Cal. 37. An averment that a tax was "duly levied" is equivalent to pleading the substance of the ordinance under which it was levied, and is sufficient to authorize the reception of the ordinance in evidence: *City of Kansas v. Johnson*, 78 Mo. 661.
- 16 *Scott v. Morgan*, 10 N. Y. Week. Dig. 531.
- 17 *Union Nat. Bank v. Mayor etc.* 51 N. Y. 638.
- 18 *People v. Todd*, 23 Cal. 181.

§ 207. **Trespass—Complaint.**—In an action for trespass to land, the complaint must aver that the plaintiff was in possession at the time of the trespass, or was put in possession afterwards.¹ But possession in the plaintiff would sufficiently appear from an allegation of title in him.² And a complaint which states that the defendant committed certain injuries to and upon the real estate of the plaintiff, is not insufficient because it does not state that the plaintiff was in the possession of such real estate;³ but in such case, he can recover for injuries to the land only;⁴ if, however, he states that

he is the owner and is also in possession of the property, he may recover for injuries to both the land and to his possession.⁵ It is not necessary to describe the lands entered upon by metes and bounds;⁶ and since actual force is not necessary to constitute a trespass upon land, it need not be alleged that the injury was forcible.⁷ A complaint in trespass for cutting down and carrying away the plaintiff's trees is good, without an averment that the land where the trees were growing belonged to the plaintiff.⁸ In a complaint against a railroad company for trespass in laying its tracks in a public street, between the centre thereof and the plaintiff's lots, it is sufficient for the plaintiff to allege his ownership of the lots, and the commission of the trespass thereon;⁹ the plaintiff's ownership in the street will be implied from the averment of his ownership of the adjacent lots.¹⁰ And a complaint alleging that the plaintiff's intestate was the owner of certain premises subject to the easement of a highway in a portion thereof, and that the defendant wrongfully entered on the portion used as a highway, and committed acts of trespass by running daily therein steam engines and cars, to the injury of said premises and the plaintiff's business in the adjacent building, states a good cause of action for a trespass.¹¹ In trespass to land, a superfluous reference in the complaint to the statute giving treble damages, does not prejudice the plaintiff's right of action.¹² And the introduction in a complaint of an averment of a forcible entry upon the plaintiff's premises, in the same statement with an allegation of an unlawful carrying away of his property, does not prevent a recovery for the latter, although there be no evidence offered of such forcible entry.¹³ Trespass *de bonis asportatis* could always as a separate cause of action be joined with trespass *quare clausum fregit*,¹⁴ and are joinable under

the Code system of pleading.¹⁵ But a count in a complaint alleging a trespass *quare clausum fregit*, is inconsistent with one alleging that the defendant was a tenant for years of the close, and committed waste thereon.¹⁶ A complaint containing apt allegations of an unlawful and forcible breaking and entry upon land, and the taking down of a fence enclosing the same, belonging to the plaintiff, and that by reason thereof one of the plaintiff's cows strayed from the land and was killed, states merely a cause of action for a trespass to realty, and the allegations respecting the death of the cow do not constitute a separate cause of action, but go only to the question of damages.¹⁷ A complaint which fails to state sufficient facts to show wherein the refusal of the defendant to remove his house from the ground in controversy was wrongful or unlawful, or that the damages claimed were the direct result of a wrongful or unlawful dispossession, occupation, trespass, or detention, fails to state a cause of action, and is bad on demurrer.¹⁸

1 Mack v. Staab, N. Y. Com. Pl. Abb., An. Dig. (1884) 270; Cowenhoven v. City of Brooklyn, 38 Barb. 9. And see Wood v. Lafayette, 63 N. Y. 131; Nostrand v. Durland, 21 Barb. 478; McMenemy v. Cohick, 1 Mo. App. 523; Fuhrer v. Langford, 11 Mo. App. 236; Utten-dorffer v. Sagers, 50 Cal. 496. One who is neither the owner of nor in possession of land cannot maintain trespass or case for an injury to the land: Williams v. Shade, 13 Ill. App. 337.

2 Cowenhoven v. City of Brooklyn, 38 Barb. 9. And see Daley v. City of St. Paul, 7 Minn. 390. A complaint in trespass merely averring that the plaintiff was "entitled to the exclusive possession" of the premises, is an assumption of law, and is bad: Garner v. McCullough, 48 Mo. 318; Smith v. Dean, 19 Mo. 63; Sheridan v. Jackson, 72 N. Y. 170.

3 Fitzpatrick v. Gebhart, 7 Kan. 35. And see Gilmore v. Roberts, 18 S. C. 551.

4 Fitzpatrick v. Gebhart, 7 Kan. 35.

5 Fitzpatrick v. Gebhart, 7 Kan. 35. And see Vance v. Beatty, 4 Rich. 104; Palmer v. Tuttle, 39 N. H. 486.

6 Whitaker v. Forbes, 68 N. C. 223. And see Shipley v. Isenhower, 27 Ind. 36.

7 Febes v. Tiernan, 1 Mont. 479; Darst v. Rush, 14 Cal. 81.

8 Gronour v. Daniels, 7 Blackf. 103. And see Atlantic etc. R. R. Co. v. Freeman, 61 Mo. 80.

9 *Spencer v. St. Paul etc. R. R. Co.* 21 Minn. 362. And see *Hussner v. Railroad Co.* 96 N. Y. 18.

10 *Spencer v. St. Paul etc. R. R. Co.* 21 Minn. 362. And see *Hussner v. Railroad Co.* 96 N. Y. 18.

11 *Hussner v. Brooklyn City R. R. Co.* 18 N. Y. Week. Dig. 217; S. C. aff'd, 19 N. Y. Week. Dig. 111; 96 N. Y. 18. And see *Mott v. Mott*, 68 N. Y. 253.

12 *Starkweather v. Quigley*, 7 Hun, 26.

13 *Colton v. Jones*, 7 Robt. 164. And see *White v. Bircher*, 6 Mo. App. 593.

14 See *Floyd v. Floyd*, 4 Rich. 23; *Helmer v. Wilcox*, 1 Ind. 29; *McClees v. Sikes*, 1 Jones (N. C.) 310; *Lovett v. Pell*, 22 Wend. 369.

15 *Colton v. Jones*, 7 Robt. 164. Compare *Frost v. Duncan*, 19 Barb. 560.

16 *Evangelical Lutheran Church v. Finger*, 11 N. Y. Week. Dig. 460.

17 *Sayles v. Bemis*, 57 Wis. 315.

18 *Brandenburg v. Miles*, 7 Colo. 537.

§ 208. **Trespass—Answer.**—It is held that a defendant cannot, under a general denial in his answer, excuse a trespass by proving the right of possession or title in some third person, but that such defense must be specially pleaded.¹ But an allegation in the answer that the property taken was owned by a third person, and that all the alleged trespass was made under the direction and as the agents of said person, is sufficient to authorize proof of such ownership and agency.² So it was held in an action trespass *quare clausum fregit*, that the defendant may prove, under a general denial, that a tenant of the plaintiff was in the actual possession.³ In such action, where the complaint avers matters of aggravation after the entry, an answer justifying the aggravating matter, but admitting the plaintiff's title and possession, does not state facts sufficient to constitute a defense.⁴ Where the complaint alleged the plaintiff's ownership of the *locus in quo*, and the defendant in his answer justified the entry upon the ground that he had an open right of way over the premises, this was held to be an admission of the plaintiff's title and possession, and his unsuccessful attempt to prove either

title or possession did not deprive him of the benefit of the admission.⁵ It is not a sufficient traverse of the allegation of possession by the plaintiff, for the defendant to aver in his answer, that to the best of his information and belief he did not commit the grievance upon any land in the lawful possession of the plaintiff.⁶ Where the complaint alleges the plaintiff's ownership and possession of the land, and the answer does not deny the possession, but sets up title in the defendant, the latter has the affirmative to defeat the former's title.⁷ A right of way, either public or private, is an interest in land,⁸ and one who relies upon such a right as a defense to an action of trespass commenced in a Justice's Court must plead the same specially, and tender the bond required by statute.⁹ And in an action for trespass to land, if the defendant relies upon a license, it must be specially pleaded, and cannot be given in evidence under the general issue;¹⁰ but if the facts constituting the license are averred, it is enough.¹¹ An answer justifying merely because the defendant has an easement on the land, without setting forth how the enjoyment of the easement was impeded, contains no defense.¹² An answer justifying a trespass on the ground of official duty should aver that the defendant is an officer, and what his official duty is, and in case there are other defendants, and the answer is intended to apply to them, it should state that they entered in aid of the officer.¹³ And it may be stated as a general rule, that matter in justification of a trespass must be specially pleaded.¹⁴

1 *Patterson v. Clark*, 20 Iowa, 429; *Althause v. Rice*, 4 Smith, E. D. 348; *Squires v. Seward*, 16 How. Pr. 478. And see *Gerber v. Monie*, 56 Barb. 652; *O'Reilly v. Davies*, 4 Sand. 722; *Demick v. Chapman*, 11 Johns. 132; *Marsden v. Cornell*, 62 N. Y. 222; *Richardson v. City of Boston*, 19 How. 263. Compare § 73, *ante*.

2 *Adams v. Robeson*, 19 N. Y. Week. Dig. 468.

3 *Uttendorffer v. Saegers*, 50 Cal. 496.

4 *Pico v. Collmas*, 32 Cal. 578.

- 5 *Potter v. Smith*, 70 N. Y. 299.
- 6 *McCormick v. Balley*, 10 Cal. 230.
- 7 *Wheeler v. Spinola*, 54 N. Y. 377.
- 8 *State v. Huck*, 29 Wis. 202; *Ashbough v. Watter*, 24 Wis. 406; *Striker v. Mott*, 6 Wend. 465.
- 9 *Lowitz v. Leverentz*, 57 Wis. 594. See *Douglas v. Valentine*, 7 Johns. 273.
- 10 *Lockhart v. Geir*, 54 Wis. 133; *Beatty v. Swarthout*, 32 Barb. 263. And see § , *ante*.
- 11 *Lockhart v. Geir*, 54 Wis. 133.
- 12 *Pico v. Collimas*, 32 Cal. 578.
- 13 *Pico v. Collimas*, 32 Cal. 578.
- 14 *Demick v. Chapman*, 11 Johns. 132; *Knox v. Marshall*, 19 Cal. 617; *McComb v. Reed*, 28 Cal. 281; *McDonald v. Prescott*, 2 Nev. 109.

§ 209. **Trusts.** — A complaint which does not set forth a case of trust, nor seek relief on that account, does not present a case for equity jurisdiction on the ground of trust.¹ If the complaint in an action seeks a recovery by virtue of the existence of a trust, it should be substantially charged with reasonable certainty.² So in an action to have a trust declared, all the facts from which the trust is claimed to result should be set out.³ But a complaint is not defective for omitting to state the conclusion from the facts alleged.⁴ One seeking to enforce a resulting trust must show by appropriate averments that it belongs under some one of the classes mentioned in the statute.⁵ If it is sought to enforce the execution of a trust in the name of a mere volunteer, and for his benefit, a declaration of trust in his favor must be alleged.⁶ The court having authority to appoint a trustee of real estate in place of a deceased trustee, an allegation that he was duly appointed by an order of the court is sufficient.⁷ One count in a complaint, alleging that certain shares of stock owned by the plaintiff were purchased at judicial sale by the defendant, under a parol agreement that the defendant should hold the shares in trust, and reconvey them upon payment of a debt due from the plaintiff, may be properly joined

with another, alleging want of jurisdiction in the court making such sale, but that the defendant under color thereof procured the transfer of the shares on the books of the company, and received dividends thereon in trust for the plaintiff.⁸ This is in accordance with the principle that "where the title to the relief will be precisely the same in each case, the plaintiff may aver facts of a different nature, which will equally support his application."⁹

1 Claussen v. Lafrenz, 4 Greene, 224.

2 Brace v. Reld, 3 Greene, 422.

3 Hickey v. Young, 1 Marsh. J. J. 1; Courvoisier v. Bouvier, 3 Neb. 55; Rowell v. Freese, 23 Me. 132. And see White v. Weldon, 4 Nev. 280; Shepard v. Pratt, 32 Iowa, 293. A bill to establish a trust in property supposed to have been purchased with trust funds, must allege that fact: Danforth v. Herbert, 33 Ala. 497.

4 Case v. Carroll, 35 N. Y. 335. In a suit to enforce a trust on which a conveyance absolute on its face was made, the complaint need not allege that the terms of the trust were omitted from the deed by fraud or mistake, the suit not being to reform the deed: Link v. Link, 90 N. C. 235.

5 Graves v. Graves, 3 Met. (Ky.) 167. See Kennedy v. Taylor, 20 Kan. 553. A *cestui que trust* who seeks to establish a stale trust, should set forth specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, the means used by the respondent to fraudulently conceal the facts from him, and when he first had knowledge of his rights: Badger v. Badger, 2 Wall. 87.

6 Crompton v. Vasser, 19 Ala. 259.

7 Hoff v. Pentz, 2 N. Y. Week. Dig. 493.

8 Williams v. Lowe, 4 Neb. 382.

9 Story Eq. Plead. § 254. And see Lloyd v. Brewster, 4 Paige, 537; Colton v. Ross, 2 Paige, 396; Williams v. Lowe, 4 Neb. 382; Cadwalader v. Granville etc. Soc. 11 Ohio, 298. A petition alleging that the defendant had possession of property left in trust for the use and benefit of the petitioners, but that he refuses to deliver or pay over such property or the profits thereof, discloses a good cause of action, for which equity will grant relief under a general prayer, although the specific relief prayed for might not be granted: Dial v. Dial, 21 Tex. 529.

§ 210. Vendor and purchaser. — There can be no available fraud without an injury;¹ hence a complaint in an action for damages for fraud practiced upon the plaintiff by the defendant in an exchange of lands, is insufficient in the absence of an allegation that any such exchange had ever been made, or that any loss

otherwise had been sustained by the plaintiff on account of the fraud alleged.² So a party who seeks to set aside an agreement by reason of fraud in its inception, must proceed promptly upon the discovery of the fraud;³ and a complaint is not sufficient for a rescission of a contract for the sale of land, upon the ground of fraud, which does not show that the offer to rescind was made in proper time.⁴ A complaint by a purchaser of lands against the vendor alleging fraud, in that the defendant, for the purpose of deceiving, procured a guide to exhibit to the plaintiff's other lands of greater value than the lands sought to be inspected, is not sustained by proof that the parties were equally misled by the guide without the knowledge or wish of the defendant, who merely paid the guide for his services.⁵ A complaint by the purchaser against the vendor, alleging that the latter had rescinded the contract of purchase, and ousted the former from, and taken possession of the land, and demanding the recovery of the purchase money previously paid on the contract, is held sufficient on demurrer, without averring the manner and particulars of either the rescission or ouster, these being matters of evidence.⁶ When an action is brought to rescind a contract or set aside a conveyance of real property, the complaint is demurrable, unless it contains an offer to repay any consideration alleged to have been received by the plaintiff.⁷ But if the complaint is silent as to the receipt of consideration it is not demurrable, but is vulnerable only to a motion for a more specific statement, or the defendant may, as a defense in his answer, set up the payment on his part, and the failure of the plaintiff to plead an offer to repay the same;⁸ if he fails to adopt either of these methods to raise the defense, he will be deemed to have waived it.⁹ In an action for the purchase money of

land on an agreement of sale, it is held that the vendor must aver and prove a tender of a deed and demand of the price;¹⁰ and in such case it is not necessary to the defense to aver and prove a tender of the purchase money, and demand of a conveyance, it being sufficient to plead that no deed was tendered.¹¹ If payment of the purchase money is resisted by the vendee on account of defects of title in the vendor, he must, by allegation and proof, make and sustain specific charges, showing where the deficiency is, who claims title to the land, and that the claim is good.¹² It is not sufficient to allege generally that the vendor had no title, or that the fee simple is in another.¹³ An answer in a suit for the purchase money of land, that a lien for taxes encumbered the land at the time of the conveyance, which the defendant had been obliged to pay, is bad for a failure to allege a covenant in the deed against encumbrances.¹⁴ A plea of failure of consideration in an action for the price of land must allege not only misrepresentations, but that the party relied on and was deceived by them;¹⁵ and it must state facts which will show the vendors to be in default in not making title.¹⁶ In a suit to enforce a vendor's lien upon land, the legal title to which the vendor retained in himself, the vendee pleaded the Statute of Limitations, and also that he had made full payment, and demanded a deed, but the vendor had refused to deliver one, and prayed for general relief; and it was held that this latter plea and prayer constituted a waiver of the plea of limitation.¹⁷ A complaint setting forth the due execution, acknowledgment, delivery, and recording of a bond conditioned for the conveyance of real estate, the default of the obligee in making payment, the performance by the obligor of all that was required of him, his tender of the deed in court,

and request that the obligee be required to pay the balance due, and accept the deed at or before a time certain to be fixed by the court, or in default thereof, that the bond be delivered up to be cancelled, and the obligee thereafter be barred of all right, etc., in the premises, states a good cause of action.¹⁸ And an answer admitting the default, and stating that the property at the time of the purchase was worth the agreed price, but had since greatly depreciated in value, that the obligee desired to redeem the property, that by reason of its depreciation and the stringency of money he could not do so within a short time, that if an early day was fixed for the foreclosure it would be impossible for him to redeem, etc., constitutes no defense to the action.¹⁹

1 Bish v. Van Cannon, 94 Ind. 263, 266; Linn v. Green, Cir. Ct. Colo. 3 Colo. Law Rep. 530.

2 Bish v. Van Cannon, 94 Ind. 263.

3 Watson etc. Co. v. Casteel, 63 Ind. 476; Krutz v. Craig, 53 Ind. 561; Moon v. Baum, 58 Ind. 194; Barton v. Simmons, 14 Ind. 49.

4 Hunt v. Blanton, 89 Ind. 28.

5 Hunt v. Blanton, 89 Ind. 38.

6 Gwynne v. Ramsey, 92 Ind. 414. And see Smith v. Felton, 85 Ind. 223.

7 Seymour v. Shea, 62 Iowa, 708. And see Coghill v. Boring, 15 Cal. 213; § 194, *ante*. When a contract has been induced by fraud, it is not necessary that the complaint in an action to rescind should contain an offer to restore what has been received under the contract: Hay v. Hay, 13 Hun, 315; American Wine Co. v. Brasher, Cir. Ct. Colo. 3 Colo. Law Rep. 60. It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made, that such an offer is necessary: Hay v. Hay, 13 Hun, 315. The fact that the defendant alleges fraud on the part of the plaintiff or his assignor, in inducing the making of the contract sued on, and fails to prove it at the trial, does not prevent him from prevailing, if, disregarding the evidence adduced to show fraud, enough remains to show that the plaintiff was not entitled to performance: Smyth v. Sturges, 13 Abb. N. C. 75.

8 Seymour v. Shea, 62 Iowa, 708.

9 Seymour v. Shea, 62 Iowa, 708.

10 Smith v. Henry, 7 Ark. 207. It is a sufficient averment of an offer to perform, if the plaintiff alleges that he attended at the time and place appointed, and offered to execute a conveyance according to his agreement, and that the defendant did not attend, and that he refused to accept the same and perform the agreement on his part: Miller v. Drake, 1 Calnes, 45.

11 *Smith v. Henry*, 7 Ark. 207. And see *Price v. Sanders*, 39 Ark. 300. But a vendor holding a merely equitable title to land may maintain an action for the recovery of the purchase price without making tender of a deed: *Nau v. Jackman*, 58 Iowa, 359. There can be no recovery by an executor of the price of land which the testator agreed to convey, unless he avers title in himself, the heirs, or devisees, as the case may be: *Phillips v. Breck*, 79 Ky. 465.

12 *Walker v. Towns*, 23 Ark. 147; *Bolton v. Branch*, 22 Ark. 435.

13 *Walker v. Towns*, 23 Ark. 147; *Copeland v. Loan*, 10 Mo. 266. And see *Webster v. Laws*, 89 N. C. 224.

14 *Jenkinson v. Ewing*, 17 Ind. 505.

15 *Luckie v. McGlasson*, 22 Tex. 282.

16 *Luckie v. McGlasson*, 22 Tex. 282.

17 *Adair v. Adair*, 78 Mo. 630. A vendor is not entitled to a judgment for the foreclosure of an alleged lien on land when it is not alleged in his petition what were the terms of the contract of sale between the parties, nor that he is able to convey according to the terms of the contract, nor that he has the legal title to the land: *Williams v. Abrahams*, 3 Bush, 186; *Calvin v. Duncan*, 12 Bush, 101. A vendor's lien may be established without averment of proof of the vendee's insolvency, but the decree can only be for the sale of the land after exhausting other property of the vendee: *Citizens' State Bank v. Adams*, 91 Ind. 280. Compare *McCauley v. Holtz*, 62 Ind. 205.

18 *Dahl v. Pross*, 6 Minn. 89; *Yoss v. Freudenrich*, 6 Minn. 95.

19 *Yoss v. Freudenrich*, 6 Minn. 95.

§ 211. **Waste.**—In an action for waste against a tenant for life or years, the plaintiff must allege a seisin in fee in himself, as well as a demise to the tenant.¹ But it is not necessary for the complaint in an action of waste to contain a reference to the statute or provision for treble damages to entitle the plaintiff to such damages.² In an action by the reversioner against tenant for life, and another to recover damages for injuries to the inheritance and reversionary interest of the plaintiff, the complaint may state a cause of action for wrongfully cutting, removing, and converting wood, and also a cause of action for drawing off the wood which had been cut, and converting it.³ And in an action by the reversioner to compel the tenant for life to account for waste, he may in his complaint set up threatened waste, and have an injunction against the tenant, and others in collusion with him.⁴

1 Carris v. Ingalls, 12 Wend. 70. The action of waste at common law could only be brought by one having the immediate estate of inheritance, but the plaintiff need not set out his title particularly: Greenly v. Hall, 3 Har. (Del.) 9. See Boone Real Prop. § 119.

2 Carris v. Ingalls, 12 Wend. 70; Robinson v. Kinne, 1 Thomp. & C. 60. But see Chipman v. Emeric, 3 Cal. 273; 5 Cal. 239.

3 Rodgers v. Rodgers, 11 Barb. 595.

4 Rodgers v. Rodgers, 11 Barb. 595. It is no defense to an action for waste against a tenant for life that he acted in good faith or under a claim of right, or that he was in possession claiming a fee: Robinson v. Kinne, 70 N. Y. 147. See Zimmerman v. Amaker, 10 S. C. 98. It is not waste for a life tenant to cut timber so as to fit the land for cultivation or pasture, provided this does not damage or diminish the value of the inheritance, and is conformable to the rules of good husbandry: Wilkinson v. Wilkinson, 59 Wis. 557.

§ 212. Wills.—Jurisdiction of an action for the construction of a will is incidental to that over trusts, and exists only where the court is moved on behalf of an executor, trustee, or *cestui que trust*, and to insure a correct administration of the power conferred by a will.¹ Where no trust is involved, and no advice or guidance to an executor or other trustee is required, parties claiming under or against a will cannot maintain an action for the mere purpose of obtaining the court's opinion as to its meaning or legal effect.² In an action to obtain construction of a will, the complaint should state that the testator left property, and also whether real or personal, or both.³ And if, in any case, an action to obtain a judicial construction of a will of personalty can be maintained by one entitled as distributee, against an executor of such will, it must be alleged in the complaint and proved upon the trial that the executor has in his possession, when the action is brought, personal property held upon the trusts in controversy.⁴ Where, in an action for the construction of a will, the defendants, in their answer, ask that the will be construed as desired by them, this is not to be taken as a waiver of the objection that the action as brought could not be maintained.⁵ The complaint in an action for the construction of a will, alleged that the

misdescription of the lot devised to the plaintiff was apparent upon the face of the will, but did not refer to any clause of the will supporting such an averment, and it was held that the averment being of a mere conclusion of law, was not confessed by demurrer.⁶ In an action to contest the validity of a will, the complaint must allege the death of the testator, and must show the plaintiff to have an interest of some kind in the subject-matter involved in the contest.⁷ The will itself not being the foundation of such action, a copy thereof attached to the complaint cannot be used to supply any of the averments which the complaint ought to contain, but does not.⁸ The general allegation that the testator was of unsound mind includes every species of unsoundness of mind;⁹ and the allegation that the will was unduly executed, includes duress, fraud, and whatever else goes to show undue execution.¹⁰ A petition for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator, must state the facts and circumstances constituting the fraud.¹¹

1 *Bailey v. Briggs*, 6 Lans. 356; 56 N. Y. 407. And see *Wager v. Wager*, 89 N. Y. 161.

2 *Collins v. Collins*, 19 Ohio St. 468; *Corry v. Fleming*, 29 Ohio St. 147; *Rothgeb v. Mauck*, 35 Ohio St. 503; *Sutherland v. Ronald*, 11 Hun, 238; *Chipman v. Montgomery*, 4 Hun, 739; 63 N. Y. 221.

3 *Walrath v. Handy*, 24 How. Pr. 353; *Simmons v. Fairchild*, 42 Barb. 404, 410.

4 *Chipman v. Montgomery*, 4 Hun, 739.

5 *Marlett v. Marlett*, 14 Hun, 313.

6 *Sherwood v. Sherwood*, 45 Wis. 357. In an action to construe a will, if it appears upon the face of the complaint that there is no reason for the intervention of the court, a demurrer to the complaint will be sustained: *Topf v. Wieggers*, 3 N. Y. Month. Law Bull. 103.

7 *Schmidt v. Bomersbach*, 64 Ind. 53; *Neiderhaus v. Heldt*, 27 Ind. 480. A petition in an action to set aside a will, which alleges the death of the deceased, his ownership of property, the heirship of the plaintiff, the forgery of the will, its probate, and the perjury by which such probate was secured, states a cause of action: *Fowler v. Young*, 19 Kan. 150. A complaint in such action, which shows no joint cause of action in the plaintiffs, is insufficient: *Scott v. Farman*, 59 Ind. 580; *Harris v. Harris*, 61 Ind. 117.

8 *Schmidt v. Bomersbach*, 64 Ind. 53. And see *Wilkinson v. City of Peru*, 61 Ind. 1; *State v. Boyd*, 63 Ind. 428. The original will, when not lost or destroyed, and not a copy used in the pleadings, should be produced to the jury in proceedings to contest its validity: *Haynes v. Haynes*, 33 Ohio St. 598.

9 *Willett v. Porter*, 42 Ind. 250. A testator's mental unsoundness is sufficiently averred by an allegation that at the time of signing the supposed will he was not of sound and disposing mind, but, on the contrary, he was at such time of unsound mind: *Estate of Crozier*, Sup. Ct. Cal. 3 West C. Rep. 377.

10 *Willett v. Porter*, 42 Ind. 250. But see *Clarke's Estate*, Myr. Prob. Cal. 250.

11 *Estate of Kidder*, Sup. Ct. Cal. 5 West C. Rep. 755. And see *Goodwin v. Goodwin*, 59 Cal. 582.

§ 213. **Written instrument.**—Where several paragraphs of a pleading are founded upon the same written instrument, each professing to set out a copy thereof, one copy filed with the pleading is sufficient for all the paragraphs.¹ And it has been held, that a cross-petition need not set out a copy of the written obligation on which it is based, when it appears that the obligation is attached to the original petition.² But a demurrer was sustained to a petition, which showed upon its face that the contract declared on consisted of a written order, and a letter and the answer thereto in relation to such order, but failed, without giving any sufficient reason therefor, to set out a copy of one of the letters.³ An allegation in answer that the defendant denies that a true copy of the agreement sued on is set forth in the complaint is neither a general nor a specific denial, but an affirmative defense, and he should be required to furnish particulars of the difference between the copy of the agreement set forth in the complaint and the instrument as it should be given.⁴ Where a pleading is founded on a written instrument, the rule is imperative that the original or a copy must be filed with such pleading;⁵ and if this be not done, and a sufficient excuse for such omission be not shown in the pleading, it will be held bad on demurrer for the want of

sufficient facts.⁶ In an action for the reformation of a written instrument, so much of the instrument as is sought to be reformed must be set forth accurately, and also the particular reformation sought.⁷ And a complaint to reform a written instrument which does not contain or exhibit the original or a copy of the instrument, is bad on demurrer in Indiana.⁸ But a deed or other instrument referred to in a pleading which, though it may be evidence upon the trial, is not the foundation of the action or defense, need not be made an exhibit.⁹ Thus, a complaint by a building association to foreclose a mortgage need not exhibit a copy of its constitution and by-laws, and if it does so, such exhibits will not be considered as part of the complaint.¹⁰ A complaint on a policy of insurance against loss by fire must allege an insurable interest in the property at the time it was insured, and at the time of the loss.¹¹ The value of the property at the time of loss must also be alleged, but it is not necessary to aver its value when the insurance was taken.¹² A complaint by a lessor to recover rent, upon the agreement to pay in a written lease executed by the lessor and a corporation, as lessee, shows no cause of action against the officers of the corporation.¹³ The signing alone by one party of a writing purporting to be an agreement, without delivery to or acceptance by the other party, is not an execution of the agreement,¹⁴ and in an action by the latter thereon, a complaint which fails to aver an acceptance or delivery is insufficient on demurrer.¹⁵ A complaint in an action to enforce a written instrument, not under seal and not negotiable, must allege a consideration.¹⁶ The plea of *non est factum* is only proper in actions on written instruments under seal, and cannot properly be interposed as a defense to an action of assumpsit on any simple contract in writing,

such as a promissory note or bill of exchange.¹⁷ A failure by the plaintiff to deny, by affidavit, the genuineness and due execution of an instrument in writing set forth in the answer as the foundation of the defense, does not preclude him from showing, on the trial, that it was procured by fraud or misrepresentation.¹⁸

1 Scotten v. Randolph, 96 Ind. 581; Maxwell v. Brooks, 54 Ind. 98.
2 Coe v. Lindley, 32 Iowa, 437. But see Campbell v. Routt, 42 Ind. 410; § 102, *ante*.

3 Johnson v. Tostevin, 60 Iowa, 46.

4 Sherwood v. Gardner, 5 N. Y. Civ. Proc. R. 239.

5 Sinker v. Fletcher, 61 Ind. 276; Hight v. Taylor, 97 Ind. 392.

6 Anderson School Township v. Thompson, 92 Ind. 556; Dyer v. Murdoch, 38 Mo. 224. But compare Andrews v. Alcoon, 13 Kan. 351; Calvin v. State, 12 Ohio St. 60; Larimore v. Wells, 29 Ohio St. 13; § 27, *ante*.

7 Schellens v. Equitable Life Ass. Soc. 18 N. Y. Week. Dig. 558.

8 Cottrell v. Aetna Life Ins. Co. 97 Ind. 311; Branham v. Johnson, 62 Ind. 259.

9 Sedgwick v. Tucker, 90 Ind. 271.

10 Newman v. Ligonier Building etc. Assoc. 97 Ind. 295.

11 Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Home Ins. Co. v. Duke, 75 Ind. 535. See § 155, *ante*.

12 Phoenix Ins. Co. v. Benton, 87 Ind. 132; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315. And see Aetna Ins. Co. v. Kittles, 81 Ind. 96. The kind and character of the property insured, its location, and the term for which the insurance was affected, must be alleged; Johnson v. Home Ins. Co. Sup. Ct. Wy. 6 West C. Rep. 420.

13 Terstegge v. First German etc. Soc. 92 Ind. 82.

14 Prather v. Dulauf, 38 Ind. 155; Cline v. Guthrie, 42 Ind. 227; 13 Am. Rep. 357.

15 Elliott v. Champ, 91 Ind. 398. And see Petty v. Board etc. 70 Ind. 290. Compare Hanna v. Barker, 6 Colo. 303; 3 Colo. Law R. 309.

16 Felt v. Judd, 3 Utah, 414. And see § 123, *ante*.

17 Luna v. Mohr, Sup. Ct. N. M. 1 West C. Rep. 673.

18 Cox v. North Western Stage Co. 1 Idaho, 376. Compare Bryan v. Maune, 28 Cal. 238; Corcoran v. Dall, 32 Cal. 82; Smith v. Milburn, 17 Iowa, 30. Where a written instrument set forth in the answer is not denied by the plaintiff's affidavit, and evidence in respect to that matter, and tending to show that the instrument is not genuine, or was not delivered, is introduced without objection or motion to strike out, and is met by counter-evidence, the defendant will not be permitted to claim that the genuineness and due execution of the instrument are admitted; Clark v. Childs, Sup. Ct. Cal. 4 Pacif. L. Rep. 1058.

CHAPTER IX.

VARIANCE.

- § 214. Nature of.
- § 215. When material.
- § 216. When not material.
- § 217. Failure of proof.
- § 218. Instances of immaterial variances.
- § 219. Instances of fatal variance or failure of proof.
- § 220. In matters of description.
- § 221. Allegation as to joint or several liability.
- § 222. Allegation of performance — Waiver.
- § 223. Between proof and bill of particulars.
- § 224. Between summons and complaint.

§ 214. *Nature of.* — The object of pleading is to inform the adverse party of the facts relied upon by the pleader, to enable such adverse party to meet them by opposing proof.¹ The plaintiff cannot declare on one theory and recover on another;² on the contrary, it is a firmly settled rule, that the allegations and proof must correspond, mutually supporting each other.³ And if the proof does not sustain the facts as stated, it is a *variance*;⁴ and the consequences of a variance between the averments in a pleading and the proof are the same under the Code system as at common law, except that they may, to a great extent, be obviated by amendments to the pleadings, which are allowed with great liberality.⁵ A variance may, however, require a dismissal of the action, or in proper cases, an amendment may be allowed.⁶ But the plaintiff is not bound to prove his cause of action literally, but substantially only.⁷ If the proof contains a cause of action which can be found in the complaint, it is enough.⁸ It is sufficient if the substance of the issue be established.⁹

1 Crandall v. Clark, 7 Barb. 169, 171; Russell v. Clapp, 7 Barb. 482, 484.

2 Hays v. Carr, 83 Ind. 275; Neldefer v. Chastain, 71 Ind. 363; 36 Am. Rep. 198; West. Union Tel. Co. v. Reed, 96 Ind. 195, 198; Dan Hartog v. Tibbitts, 1 Utah, 328.

3 Stout v. Coffin, 23 Cal. 65; Tomlinson v. Monroe, 41 Cal. 94; Rowan v. Bowles, 21 Ill. 17; Tucker v. Parks, 7 Colo. 62, 63.

4 Knapp v. Roche, 5 Jones & S. 395, 402. And see Dunn v. Durant, 9 Daly, 391.

5 Stout v. Coffin, 23 Cal. 65, 67. The principle still remains, that the judgment to be rendered by any court must be "*secundum allegata et probata*." Wright v. Delafield, 25 N. Y. 226; Tooker v. Arnoux, 78 N. Y. 387; Neudecker v. Kohlberg, 81 N. Y. 296; Boardman v. Griffin, 52 Ind. 101; Terry v. Shively, 64 Ind. 106.

6 Knapp v. Roche, 5 Jones & S. 402; Johnson v. Moss, 45 Cal. 615.

7 Moore v. Lake Company, 58 N. H. 254.

8 Knapp v. Roche, 5 Jones & S. 403.

9 Phoenix Mut. Life Ins. Co. v. Hinesley, 75 Ind. 1; Owen v. Phillips, 73 Ind. 284. And see Long v. Doxey, 50 Ind. 385.

§ 215. **When material.** — Under the Codes, no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.¹ To be material, the variance must be such as to mislead or surprise the adverse party.² And where a party insists that he has been misled to his prejudice, that fact must be proved to the satisfaction of the court, and the proof must show in what respect he has been so misled.³ Questions of variance are in general to be determined by proof *aliunde* as to whether the party was actually misled to his prejudice.⁴ But in some cases, the materiality of the variance may be apparent upon the face of the pleadings themselves.⁵ If there is a variance, and the party proves he is misled by it, it is not a matter which can be remedied or supplied unless an amendment to the pleading is allowed.⁶ But the Codes provide that the court may, in its discretion, order the pleading to be amended upon such terms as it deems just.⁷ Objection on the ground of variance should be taken on the trial,

and where this has not been done, it is too late to make the objection in the court of review.²

1 N. Y. Code Civ. Proc. § 539; Cal. Code Civ. Proc. § 469; 2 Ohio Rev. Stats. § 5294; Wis. Rev. Stats. § 2689; N. C. Code Civ. Proc. § 128; Dakota Code Civ. Proc. § 138; Short v. McRea, 4 Minn. 119; Dodd v. Denny, 6 Oreg. 158.

2 Hays v. Samuels, 55 Tex. 500.

3 N. Y. Code Civ. Proc. § 539; Dunn v. Durant, 9 Daly, 389; Catlin v. Gunter, 11 N. Y. 368; Dodd v. Denny, 6 Oreg. 158; Meyer v. Chambers, 68 Mo. 628; Ely v. Porter, 58 Mo. 158; Bank of Pleasant Hill v. Wills, 79 Mo. 275.

4 Catlin v. Gunter, 11 N. Y. 368; 10 How. Pr. 315; Hauck v. Craighead, 4 Hun, 561; Sharp v. Mayor etc. 40 Barb. 270.

5 Lyon v. Blossom, 4 Duer, 318, 329. That variances are no longer to be determined upon the inconsistency between the pleadings and the evidence, but solely by proof that a party has been actually misled to his prejudice by the incorrect version of the facts given in the pleading; See Place v. Minster, 65 N. Y. 89, 104.

6 Dunn v. Durant, 9 Daly, 389, 391.

7 See Cal. Code Civ. Proc. § 469; N. Y. Code Civ. Proc. § 539; Dennis v. Snell, 34 How. Pr. 467; 50 Barb. 95; Hendricks v. Decker, 35 Barb. 238.

8 Nelson v. Thompson, 23 Minn. 508; Singer v. Given, 61 Iowa, 93; Bell v. Knowles, 45 Cal. 193; Chamblee v. McKenzie, 31 Ark. 155; Tyng v. Commercial Warehouse Co. 58 N. Y. 308; Smith v. Roe, 7 Colo. 95; Speer v. Bishop, 24 Ohio St. 598; Sibila v. Bahney, 34 Ohio St. 399. Compare Tisdale v. Morgan, 7 Hun, 583.

§ 216. When not material.—The existence of a variance is not material unless it has misled the adverse party to his prejudice.¹ And a variance which is not material, that is, one which has not actually misled the adverse party to his prejudice, must be disregarded, and the pleadings may be amended to conform to the facts proved.² The party raising the objection must prove that he has been misled.³ The Code provision on the subject is that where the variance is not material the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.⁴ And a judgment will not be reversed on the ground of variance, when the variance is not material.⁵

1 Dunn v. Durant, 9 Daly, 391; Koppelman v. Huffman, 12 Neb. 90; Johnston Harvester Co. v. Clark, 50 Minn. 308.

2 *Plate v. Vega*, 31 Cal. 383; *Began v. O'Reilly*, 32 Cal. 11; *Chapman v. Carolin*, 3 Bosw. 456; *Lettman v. Ritz*, 3 Sand. 734; *Craig v. Ward*, 3 Abb. Pr. N. S. 235; 1 Abb. Ct. App. 454; 36 Barb. 377; *Hauck v. Craighead*, 4 Hun, 561; *Hedrick v. Osborne*, 99 Ind. 143. And see *Williams v. Slote*, 70 N. Y. 601; *Place v. Minster*, 65 N. Y. 104.

3 *Hauck v. Craighead*, 4 Hun, 561; *Dodd v. Denny*, 6 Oreg. 156.

4 See Cal. Code Civ. Proc. § 470; N. Y. Code Civ. Proc. § 540; 2 Ohio Rev. Stats. § 5295; Wis. Rev. Stats. § 2670.

5 *Began v. O'Reilly*, 32 Cal. 11; *Missouri Valley R. R. v. Coldwell*, 8 Kan. 244; *Harris v. Wicks*, 28 Wis. 198; *Flanders v. Cottrell*, 34 Wis. 564; *Cody v. Bemis*, 40 Wis. 686; *Sibila v. Balmey*, 34 Ohio St. 399.

§ 217. *Failure of proof.*—The provision that no variance between the allegation contained in a pleading and the proof is to be deemed material, unless it may actually mislead the adverse party to his prejudice,¹ is limited by the restriction that, when the cause of action or defense, as it may have been alleged, is unproved, not merely in some particular or particulars, but in its entire scope and meaning, then the case shall not be considered one of variance, but a failure of proof.² A failure of proof is where no cause of action or defense whatever has been proved;³ and a variance where either a cause of action or defense is proved, but not the one averred in the pleading, or a variance between the facts as proved and the facts which have been averred as constituting the cause of action or defense, or some of the facts.⁴ In case of failure of proof, if the testimony is objected to by the adverse party, it must be excluded whether he would be misled or not.⁵ But the objection must be distinctly taken at the trial, or it is not available.⁶ An amendment is never allowed in a case of failure of proof unless its allowance clearly appears to be in furtherance of justice.⁷

1 § 214, *ante*.

2 N. Y. Code Civ. Proc. § 541; Cal. Code Civ. Proc. § 471; *Hauck v. Craighead*, 4 Hun 562; *Short v. McRea*, 4 Minn. 119; *Gossom v. Badgett*, 6 Bush, 97; *Waldhier v. Railroad Co.* 71 Mo. 514; *Faulkner v. Faulkner*, 73 Mo. 327.

3 *Dunn v. Durant*, 9 Daly, 301. And see *Poirer v. Fisher*, 8 Bosw. 253; *Kelsey v. Western*, 2 N. Y. 500; *Fay v. Grimsted*, 10 Barb. 321; *Gasper v. Adams*, 28 Barb. 441.

4 *Dunn v. Durant*, 9 Daly, 301.

5 *Hill v. Supervisors etc.* 10 Ohio St. 621. And see *Curtis v. Cutler*, 7 Neb. 315; *Thatcher v. Halsey*, 21 Ohio St. 663.

6 *Doyle v. Mulren*, 7 Abb. Pr. N. S. 258, 263. Compare *Dunn v. Durant*, 9 Daly, 301; *Johnson v. Moss*, 45 Cal. 515; *Dean v. Yates*, 22 Ohio St. 383; *Rosebrooks v. Dinsmore*, 36 How. Pr. 138; 5 Abb. Pr. N. S. 53; *Bell v. Knowles*, 45 Cal. 193.

7 *Egert v. Wicker*, 10 How. Pr. 193. See *Southwick v. First Nat. Bank*, 84 N. Y. 420; 61 How. Pr. 164; *Knapp v. Simon*, 96 N. Y. 234; 6 Civ. Proc. R. 1; *Grant v. Burgwyn*, 88 N. C. 95.

218. *Instances of immaterial variances.*— Among variances which have been held to be immaterial are the following: Averment of an express agreement, and evidence of an implied one¹—thus, where the complaint avers an express warranty, which is not proven, but the facts put in evidence without objection show an implied warranty to the same effect, the variance should be disregarded, or an immediate amendment allowed;² complaint on a *quantum meruit*, and proof showing a special contract fixing the price;³ allegation of an agreed compensation for services, and proof of the value of the services;⁴ allegation of neglecting to forward goods, and evidence of a refusal to deliver at their destination;⁵ allegation of services in making a sale, and proof of services in trying to make a sale;⁶ alleging an agreement to deliver property in consideration of a transfer and release of a claim against a third party, and proof of a sale of the debt without its release;⁷ allegation of false and fraudulent assertions, and proof of an implied warranty, though no fraud is shown;⁸ allegation of a sale in writing, and proof of an oral sale;⁹ allegation that the plaintiff refused to enter into the contract unless one of the defendants should indorse such contract and become responsible for its performance, and proof that the said defendant should join in and sign the same;¹⁰ averment of

wrongfully setting fire to a building, and proof of negligent fire;¹¹ allegation of an unlawful and wrongful shooting, and proof of a negligent or careless shooting;¹² allegation of the forcible expulsion of the plaintiff from the cars, and proof of jumping off under fear of execution of a threat to eject therefrom;¹³ allegation of property sold and delivered, and money had and received, and proof of a tortious taking, sale of the property, and retention of the price;¹⁴ allegation that the defendant had purchased certain goods, and proof that the purchase had been made for the defendant by another as his agent;¹⁵ allegation of authority to do an act, and proof of ratification of the act;¹⁶ averment of a cash consideration, in hand paid, and proof that the consideration was a sight draft, which was paid;¹⁷ charging that the defendant "dug, opened, and made" the area, and proof that he formed it partially by excavation and partially by raising walls;¹⁸ charging that the defendant owes the plaintiff for labor and services "in procuring a loan," and proof that the money was obtained ready to be loaned, but that the defendant, by his negligence, prevented the completion of the loan.¹⁹ Proof that the damage occurred three years prior to the time alleged in the pleading does not constitute a variance.²⁰ And variances as to dates will not, in general, be regarded as material, unless they be of the gist of the action.²¹ So a mere misnomer will be disregarded as immaterial, or amended without terms.²² Where a complaint alleged that a mortgage was "written or printed," and the proofs showed that it was partly written and partly printed, there was held to be no variance.²³ A variation between the complaint and the proof as to the details of a fraudulent conspiracy, and the mode in which it is carried out, if the proof establishes such a conspiracy and an injury to the plaintiff

consequent upon the carrying out of the fraud, is not a failure of proof, and will not justify a dismissal of the complaint.²⁴ To constitute a variance between allegation and proof, the difference must be as to the substantial elements of the case, and not as to the legal conclusions from the facts drawn by the pleader.²⁵

1 *Smith v. Lippincott*, 49 Barb. 308. And see *Fort v. Gooding*, 9 Barb. 371. But compare *Lines v. Lines*, 54 Iowa, 600.

2 *Giffert v. West*, 33 Wis. 617; *Leopold v. Vankirk*, 27 Wis. 152; 29 Wis. 548; *Chatfield v. Frost*, 3 Thomp. & C. 357.

3 *Lemke v. Daegling*, 52 Wis. 498; *Fells v. Vestvall*, 2 Keyes, 152; *Ludlow v. Dole*, 1 Hun, 75; 62 N. Y. 617.

4 *Sussdorf v. Schmidt*, 55 N. Y. 319; *Rogers v. Millard*, 44 Iowa, 466. See *Fitzsimons v. Guanahani Co.* 16 S. C. 193, 196.

5 *Rosebrooks v. Dinsmore*, 36 How. Pr. 138; 5 Abb. Pr. N. S. 59.

6 *Flanders v. Cottrell*, 36 Wis. 564; *Ralston v. Kohl*, 30 Ohio St. 98. Under a general allegation of payment evidence may be offered to show an agreement that certain accounts should be received as payment: *Sullivan v. Sullivan*, 20 S. C. 509.

7 *Meriden Brit. Co. v. Zingsen*, 4 Robt. 312; 48 N. Y. 247.

8 *Sherman v. Johnson*, 56 Barb. 58.

9 *Patterson v. Keystone Min. Co.* 30 Cal. 360. And see *Hamilton v. Gridley*, 54 Barb. 642. But compare *Dougherty v. Matthews*, 35 Mo. 520; *Phillips v. Van Schalck*, 37 Iowa, 229.

10 *Hauck v. Craighead*, 4 Hun, 561.

11 *Robinson v. Wheeler*, 25 N. Y. 252, 259. And see *McCord v. High*, 24 Iowa, 336; *Taylor v. Holman*, 45 Mo. 371; *Pollard v. Railroad Co.* 7 Bosw. 437.

12 *Conway v. Reed*, 66 Mo. 346. And see *Bullock v. Babcock*, 3 Wend. 391.

13 *Kline v. Central Pacific Railroad*, 39 Cal. 587.

14 *Harpending v. Shoemaker*, 37 Barb. 270, 291.

15 *Poole v. Hintrager*, 60 Iowa, 186.

16 *Janney v. Boyd*, 30 Minn. 312. And see *Hoyt v. Thompson*, 19 N. Y. 207.

17 *Nash v. Towne*, 5 Wall. 689.

18 *Robbins v. Chicago City*, 4 Wall. 657. Where the allegation is that goods were in a building, and the proof is that they were on the roof of a building, the variance is not material: *Yik Hon v. Spring Valley Water Works*, Sup. Ct. Cal. 4 Pacif. L. Rep. 664.

19 *Engel v. Hardt*, 56 Wis. 456.

20 *Lesinsky v. Great Western Dispatch*, 14 Mo. App. 598.

21 *Beach v. Tooker*, 10 How. Pr. 297; *Hovey v. Am. Mut. Ins. Co.* 2 Duer, 554; *Zorkowski v. Zorkowski*, 3 Robt. 613; *United States v. Le Baron*, 4 Wall. 642; *Fowler v. Martin*, 1 Thomp. & C. 377. A difference between the allegations and proof in mere matters of quantity or extent does not constitute a legal variance: *Peasley v. Hart*, Sup. Ct. Cal. 3 West C. Rep. 623.

22 *Wolcott v. Meesh*, 22 Barb. 321; *Bank of Havana v. Magee*, 7 Abb. Pr. 134; 20 N. Y. 355; *Williams v. Hitzle*, 83 Ind. 303; *Smith v. Shinn*, 68 Tex. 1; *Whitney v. Dolloff*, 74 Me. 236; *Buhl v. Trowbridge*, 42 Mich. 44. And see *Schaeffer v. Gruen*, 4 Mo. App. 115; *Haskell v. Sells*, 14 Mo. App. 91.

23 *Johnson v. State*, 69 Ala. 593.

24 *Place v. Minster*, 65 N. Y. 89.

25 *Platt v. Longworth*, 27 Ohio St. 159. A variance between allegations and proof, as to such provisions of a contract as are not essential to a recovery, is not such a variance as will defeat the plaintiff's action: *Gaines v. Union etc. Co.* 28 Ohio St. 418.

§ 219. Instances of fatal variance or failure of proof. —

If the alleged cause of action or counter-claim is a tort, and the proof shows a cause of action or counter-claim on contract, it is not a variance only, but a failure of proof.¹ Nor can there be a recovery for a tort in an action on contract.² The principle is, that the case really set forth by a party in his pleading cannot be changed upon the trial into one of a different nature.³ But the trial court may allow an amendment to a complaint striking out words sounding in tort, where their omission leaves a complete statement of a cause of action on contract, and the defendant is not misled or surprised.⁴ If fraud is alleged as the basis of the action, a recovery cannot be had for a breach of contract.⁵ Thus, where the gravamen of the action was fraud in a sale, it was held there could be no recovery upon proof of a breach of warranty only.⁶ Nor will an averment based on fraud support an action for mistake.⁷ So where an averment charges the defendant with fraud in obtaining goods and converting them to his own use, and the proof shows the defendant to be a *bona fide* purchaser from one in possession, but without title, the case is one of failure of proof, and not one of immaterial variance.⁸ So if suit is brought on account stated, and the proof fails to show such an account, though it may indicate a liability on a special contract, or for fraud, it is a case of failure of proof.⁹ Under a complaint charging a conversion of the plaintiff's property, proof of a

negligent loss, or failure to deliver it, will not sustain a recovery.¹⁰ So an averment that possession of certain notes was obtained "by trick, connivance, and fraudulent pretences" is not supported by proof of possession by virtue of an agreement fraudulently procured.¹¹ In an action on an account for work and labor performed, the plaintiff cannot recover on proof of facts showing a guaranty by the defendant that other parties would pay for the work.¹² So, under a servant's complaint alleging full performance of the contract of hire, evidence of excuse for his non-performance is not admissible.¹³ So an averment of work and labor on defendant's mill-dam, and evidence that the work and labor was performed in the defendant's harvest-field, is a fatal variance.¹⁴ The plaintiffs declared upon a note as payable to B, one of the executors of F, and at the trial offered in evidence a note payable to B and F, executors of F, and it was held a fatal variance.¹⁵ And proof of a partnership contract cannot sustain allegations of an individual contract.¹⁶ If the plaintiff brings the defendant into court to answer a complaint to quiet title, he cannot prove a breach of contract or a violation of a trust.¹⁷ Under a complaint stating facts constituting a nuisance of one kind, it is not permissible to prove a nuisance of a character essentially different.¹⁸ When a complaint merely alleges neglect of a railroad company to construct cattle-guards, a recovery cannot be had for neglect to build fences.¹⁹ So when a complaint charges one railroad company with killing stock, and the evidence shows that another company committed the injury, the variance is fatal.²⁰ And where an action for damages against a railroad company is grounded on an alleged defect in the construction of an engine, the plaintiff cannot recover for an injury resulting from a defect in the track;²¹ it is a case of entire failure of

proof.²² As a general rule, the allegation of performance of a contract cannot be supported by proof of performance of a substituted contract.²³ In an action against a common carrier based upon a special contract, to recover damages arising from delay in transportation, the plaintiff cannot sustain his action by proof of a breach of an implied contract, or of the legal duty of the defendant as a common carrier, to transport in a reasonable time;²⁴ in such case there would be, not a variance, but a failure of proof.²⁵ So under a complaint for money loaned, it is not competent for the plaintiff to prove a cause of action for money paid out for the defendant, under such circumstance as do not constitute a loan.²⁶ So where the complaint disclosed a contract terminable at the pleasure of either party, and the contract proved was one that by its terms was to continue in force for a period of time longer than one year from the making thereof, this was held a fatal variance.²⁷ And a claim to recover damages, by reason of a purchase and conveyance from one party, cannot be sustained by proof of a conveyance from another party.²⁸ The variance between a mere legal defense of payment and an equitable counter-claim for specific performance, is material and vital, and cannot be disregarded, or cured by summary amendment on the trial.²⁹ And proof of a proceeding pending in another court will not sustain an answer setting up a final settlement of the plaintiff's claim in such proceeding.³⁰ Where the defendant denied ever having possession of the plaintiff's ground, it was held that no testimony offered by the defendant that he had taken forcible possession thereof, was admissible.³¹ An averment that one made representations, knowing them to be false, is not supported simply by proof that he had no reasonable grounds for believing them true.³²

- 1 DeGraw v. Elmore, 50 N. Y. 1; Whitcomb v. Hungerford, 42 Barb. 177; Walter v. Bennett, 16 N. Y. 250; Saltus v. Genin, 7 Abb. Pr. 193; 3 Bosw. 250; Ross v. Mather, 51 N. Y. 106; Ensworth v. Barton, 60 Mo. 511.
- 2 Beard v. Yates, 2 Hun, 466; Butler v. Livermore, 53 Barb. 570.
- 3 Beard v. Yates, 2 Hun, 466; Neudecker v. Kohlberg, 81 N. Y. 296; Lewis v. Mott, 36 N. Y. 395. And see Crawford v. Thoroughman, 13 Mo. App. 579.
- 4 Beckwith v. Rochester Iron Manuf. Co. 12 N. Y. Week. Dig. 523. And see Neftel v. Lightstone, 77 N. Y. 96.
- 5 Beach v. Eager, 3 Hun, 610; Peck v. Root, 5 Hun, 547; De Graw v. Elmore, 50 N. Y. 1.
- 6 Ross v. Mather, 51 N. Y. 106.
- 7 McMichael v. Kilmer, 76 N. Y. 36; Dudley v. Scranton, 57 N. Y. 424.
- 8 Dean v. Yates, 22 Ohio St. 388. And see Bernhard v. Sellgman, 54 N. Y. 661.
- 9 Volkening v. Degraaf, 12 Jones & S. 424; 81 N. Y. 268.
- 10 Tolano v. Nat. Steam Nav. Co. 4 Abb. Pr. N. S. 316; 35 How. Pr. 496; 5 Robt. 318.
- 11 Timmons v. Wiggins, 78 Ind. 297.
- 12 Packard v. Snell, 35 Iowa, 80.
- 13 O'Leary v. N. Y. Board of Education, 9 Daly, 161; Fauble v. Davis, 48 Iowa, 462.
- 14 Thatcher v. Helsey, 21 Ohio St. 668.
- 15 Faulkner v. Faulkner 73 Mo. 327.
- 16 McCord v. Seale, 56 Cal. 262. Compare Burns v. Iowa Homestead Co. 43 Iowa, 279; Archibald v. Mut. Ins. Co. 38 Wis. 542. Where the proof in an action by the general and special partners shows a non-compliance with the statute in regard to the kind of capital contributed by the special partner, which results in such special partner being made a general partner, it is not a variance though the complaint rests solely on the existence of the special partnership: Rosenberg v. Block, 18 Jones & S. 357.
- 17 Hays v. Carr, 83 Ind. 275, 287.
- 18 O'Brien v. City of St. Paul, 18 Minn. 176.
- 19 Parker v. Railroad Co. 16 Barb. 315.
- 20 Cln. etc. R. R. Co. v. Wood, 82 Ind. 563.
- 21 Buffington v. Railroad Co. 64 Mo. 249. And see Chapman v. Callahan, 66 Mo. 299; Carson v. Cummings, 60 Mo. 325.
- 22 Waldhler v. Railroad Co. 71 Mo. 514. But an allegation that the fire from the defendant's locomotive "was suffered to escape, and did escape, and by reason thereof came upon the land of the plaintiff," and proof that such fire originated on land adjoining the plaintiff's, is not a fatal variance: Butcher v. Railroad Co. Sup. Ct. Cal. 5 West C. Rep. 151.
- 23 Bishop v. Griffith, 4 Colo. 68. And see Thompson v. Jewell, 1 Marsh. A. K. 95; Crandall v. Clark, 7 Barb. 169; York v. Wallace, 43 Iowa, 305; Warren v. Bean, 6 Wis. 120; Arnold v. Angell, 62 N. Y. 508; Hollister v. Englehart, 11 Hun, 446.
- 24 Jeffersonville etc. R. R. Co. v. Worland, 50 Ind. 339.

- 25 *Jeffersonville etc. R. R. Co. v. Worland*, 50 Ind. 339.
- 26 *Cummings v. Long*, 25 Minn. 337.
- 27 *Cowles v. Warner*, 22 Minn. 449.
- 28 *Burns v. Iowa Homestead Co.* 48 Iowa, 279; *Anderson v. Case*, 28 Wis. 505.
- 29 *Stowell v. Eldred*, 39 Wis. 614.
- 30 *Remington v. Walker*, 21 Hun, 322.
- 31 *Pardee v. Murray*, 4 Mont. 234, 279.
- 32 *McKown v. Furgason*, 47 Iowa, 636; *Pearson v. Howe*, 1 Allen, 270.

§ 220. **In matters of description.**—By the rule of the common law, if a record or other document is described in a pleading, and there be any variance between the document produced and that described in pleading, the document will be rejected.¹ Every part of a written document stated in pleading is regarded as descriptive, and therefore material to be proved as alleged.² But under the more liberal system of Code pleading, to constitute a fatal variance between the instrument attempted to be described in the pleading, and the one offered in evidence, the misdescription must be such as to mislead or surprise the adverse party, otherwise it should be disregarded as immaterial.³ Thus, where the complaint described the promissory note upon which the action was founded, as payable "three months after date," and that produced on the trial was payable four months after date, the variance was held to be plainly immaterial, and properly disregarded upon the trial.⁴ So if the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full and states the rate of interest in words as well as figures, the variance is immaterial.⁵ And where on the trial the evidence tended to prove an usurious agreement which differed from the one alleged in the answer in several particulars, but not in its entire scope and meaning, and the

plaintiff gave no proof that he was misled thereby to his prejudice, it was held that the variance should be deemed immaterial.⁶ Where an instrument is designated in the complaint as a lease, but of whose contents the defendant is fully apprised, and the instrument, when produced on the trial, appears to be not a lease but a mining license, an amendment of the complaint may properly be made, but there is no such variance between the allegation and the proof as to authorize a nonsuit.⁷ A party who alleges in his pleading that a certain promissory note was made on a certain day, may, at the trial, with the consent of the court, so amend his pleading as to allege that the note was made on some other day.⁸ So if the complaint describes a bill of exchange as payable to the order of A, whereas the bill offered in evidence is payable to B, it is a variance, but the court may, upon terms, allow an amendment of the complaint, if it would not operate as a surprise upon the defendant.⁹ Where the complaint alleged that a draft was signed "John Q. Jackson," and the proof showed that it was signed "John Q. Jackson, Agent," the variance was held to be immaterial.¹⁰ Where an instrument in writing is described in the complaint as a contract to pay one hundred dollars, and the contract given in evidence is an agreement to pay one dollar, the complaint will be considered as amended in the higher court, and the variance avoided;¹¹ but the recovery is limited to the lesser amount, no averment of any mistake as to the amount agreed to be paid having been made.¹² A note and mortgage given to secure an indebtedness to a county, running in terms to the supervisors of such county or their successors in office, may be declared upon as obligations to the county, and the misdescription of the obligee will not vitiate them.¹³ And where letters are declared on in

substance as showing a contract, a literal variance between one of them as presented in evidence, and as set forth in the pleading, is not sufficient to exclude it.¹⁴ But where a note declared on does not mention any place of payment, and that offered in evidence is made payable at a certain bank, the variance is held to be fatal.¹⁵ So an instrument was described in the complaint as an obligation to pay the plaintiff the full sum of five thousand dollars, and the instrument offered in evidence was an obligation to pay a sum not to exceed five thousand dollars, subject to certain provisos and conditions therein, and the variance was held fatal.¹⁶

1 *Walters v. Mace*, 2 Barn. & Ald. 756; *May v. Miller*, 27 Ala. 515; *Stickney v. Stickney*, 21 N. H. 61, 69; *Hooker v. Gallagher*, 6 Fla. 351; *McNamee v. Minke*, 49 Md. 122; *Atlantic etc. Ins. Co. v. Sanders*, 36 N. H. 252; *Conolly v. Cottl.*, 1 Ill. 286. But in an action upon a contract, a variance between the declaration and proof, not matter of description, and which does not change the nature of the contract, is immaterial *Moore v. Lake Company*, 58 N. H. 254; *Ferguson v. Harwood*, 7 Cranch. 408.

2 *Weall v. King*, 12 East, 452; *Loper v. De Talest*, 1 Brod. & B. 538; *McNamee v. Minke*, 49 Md. 122.

3 *Hays v. Samuels*, 55 Tex. 560; *McClelland v. Smith*, 3 Tex. 210; *Estep v. Estep*, 23 Ind. 114; *Beach v. Curle*, 15 Mo. 105; *Barrick v. Austin*, 21 Barb. 241; *Chapman v. Carolin*, 3 Bosw. 456; *Knowlton v. Bowron*, 7 Wis. 500; *Herrick v. Graves*, 16 Wis. 157; *Hamilton v. Pumphrey*, 20 Ind. 396; *Bank v. Woods*, 28 N. Y. 545; *Gibbon v. Dougherty*, 10 Ohio St. 365; *Haynes v. Cowen*, 15 Kan. 637; *Krutz v. Howard*, 70 Ind. 174; *Lilly v. Baker*, 88 N. C. 151.

4 *Trowbridge v. Didier*, 4 Duer, 448. If certain writings are described in the pleadings as promissory notes, and it turns out in proof that they are also negotiable, there is no variance; *Beach v. Curle*, 15 Mo. 105.

5 *Corcoran v. Doll*, 32 Cal. 82.

6 *Catlin v. Gunter*, 11 N. Y. 368.

7 *Boone v. Stover*, 66 Mo. 430. And see *Bishop v. Griffith*, 4 Colo. 68; *Lilly v. Baker*, 88 N. C. 151.

8 *Wilson v. Phillips*, 8 Kan. 211. And see *May v. Pollard*, 28 Tex. 677; *Knowlton v. Bowron*, 7 Wis. 500; *Byington v. Bradley*, 11 Iowa, 78; *Gentry v. Doolin*, 1 Bush, 1.

9 *Farmer v. Cram*, 7 Cal. 135.

10 *Zeigler v. Wells*, 28 Cal. 263. And see *Doron v. Crosly*, 12 Ind. 634; 13 Ind. 497; *Campbell v. Wolf*, 33 Mo. 459; *Lipscomb v. Ward*, 2 Tex. 277; *Farley v. Harvey*, 14 Ind. 377.

11 *Lucas v. Smith*, 42 Ind. 103. And see *Krutz v. Howard*, 70 Ind. 174.

12 *Lucas v. Smith*, 42 Ind. 103.

13 *Supervisors etc. v. Hall*, 42 Wis. 59. And see *Cairns v. O'Brien*, 40 Wis. 469.

14 *Kimbell v. Moreland*, 55 Ga. 164.

15 *Faulkner v. Faulkner*, 73 Mo. 327. And see *Puckett v. King*, 2 Ala. 570; *Dickinson v. Tunstall*, 4 Ark. 170; *Ohio etc. R. R. Co. v. Palm*, 18 Ill. 22.

16 *Supreme Council etc. v. Anderson*, 61 Tex. 296.

§ 221. **Allegation as to joint or several liability** — At common law, where a joint contract is the subject of an action, the recovery must be against all or neither of the defendants.¹ The plaintiff will be nonsuited on the trial if he fails in proving a joint contract as alleged.² But under the Codes, where, in an action against several defendants for an alleged indebtedness by all, the evidence shows an indebtedness owing from any one of them, the plaintiff is entitled to judgment against him.³ In other words, allegation of a joint contract made by several defendants, and proof that only a part of them contracted, is allowable under the Code system of pleading.⁴ But under the present as well as the former system, if the plaintiff alleges a joint undertaking of the defendant and another, and proves only a separate undertaking by the defendant alone, there will be a failure of proof for want of identity between the cause of action with that which is alleged.⁵ And it was held that where the pleading sets up a several contract alone, a joint contract cannot be given in evidence.⁶ An action lies against one or more of the obligors on a joint and several obligation, at the option of the plaintiff, and if the complaint alleges a joint obligation, it may be amended after proof of a joint and several obligation, so as to sustain the judgment against more than one, and less than the whole number.⁷

1 See 1 Chit. Plead. 51; *McIntosh v. Ensign*, 28 N. Y. 172; *Hempy v. Ransom*, 33 Ohio St. 315; *Brown v. Warner*, 2 Marsh. J. J. 37; *Peebles v. Rand*, 43 N. H. 339; *Tuttle v. Cooper*, 10 Pick. 281.

2 *Neale v. King*, 12 East, 454; *Cooper v. Whitehouse*, 6 Car. & P. 545; *Max v. Roberts*, 12 East, 94; *Whiting v. Cook*, 8 Allen, 63.

3 *Lambkin v. Chisom*, 10 Ohio St. 450; *Hempy v. Ransom*, 33 Ohio St. 315; *Truesdell v. Rhodes*, 26 Wis. 219; *Ailnut v. Leper*, 48 Mo. 319; *Stanwix Bank v. Leggett*, 51 N. Y. 552; *Coakley v. Chamberlain*, 8 Abb. Pr. N. S. 37; *Brown v. Woods*, 48 Mo. 330; *Richardson v. Jones*, 58 Ind. 240; *Rutenberg v. Main*, 47 Cal. 213.

4 *McIntosh v. Ensign*, 23 N. Y. 172; *Brugman v. McGuire*, 32 Ark. 733; *Witherhead v. Allen*, 28 Barb. 661; *Zluk v. Attenburg*, 18 How. Pr. 108.

5 *Gossom v. Badgett*, 6 Bush, 97.

6 *Stearns v. Martin*, 4 Cal. 227. But see *Bowden v. Winsmith*, 11 S. C. 409; *Waits v. McClure*, 10 Bush, 763.

7 *Field v. Van Cott*, 15 Abb. Pr. N. S. 349; 5 Daly, 308.

§ 222. **Allegation of performance—Waiver.**— Under a complaint setting out a contract and averring its performance by the plaintiff, evidence that a performance was waived, or that the contract was altered by the acts of the parties, is not admissible.¹ Thus a plaintiff in an action against the drawer of a bill of exchange, or the indorser of a note, cannot aver demand, protest, and due notice thereof, and then recover upon proof of facts amounting to a waiver of these, as a subsequent promise to pay by the drawer or indorser after full knowledge of the facts.² So in an action against an indorser, under an allegation that the plaintiff used due diligence in the prosecution of a suit against the maker, evidence that such suit would have been unavailing because of the insolvency of the maker, is not admissible.³ But the general rule that evidence in excuse for non-performance, under an averment of performance is not admissible, is said to be of little consequence, since the party may amend his pleading and then give the evidence.⁴ If a waiver is relied upon as a defense it must be specially pleaded.⁵ So an estoppel must be specially pleaded to authorize evidence to establish it;⁶ therefore, in an action declaring on a written contract, it was held that evidence of facts showing an estoppel to deny such contract amounted to a failure of proof.⁷

But in an action for the conversion of a chattel, it seems that facts showing an estoppel of the plaintiff to claim title may be given in evidence on the question of title, without being specially pleaded.⁸

1 *Fauble v. Davis*, 49 Iowa, 462; *O'Leary v. Board of Education*, 9 Daly, 161; *Edgerly v. Farmers' Ins. Co.* 43 Iowa, 587

2 *Lumbert v. Palmer*, 29 Iowa, 104; *Pier v. Heinrichoffen*, 52 Mo. 333.

3 *Woolsey v. Williams*, 34 Iowa, 413. And see *Bernhard v. Wash. Life Ins. Co.* 40 Iowa, 442; *Edgerly v. Farmers' Ins. Co.* 43 Iowa, 587; *Oakley v. Morton*, 11 N. Y. 25.

4 *Hosley v. Black*, 23 N. Y. 438; *Dauchy v. Tyler*, 15 How. Pr. 399.

5 *Livesey v. Omaha Hotel Co.* 5 Neb. 50; *Murphy v. Sherman*, 21 Minn. 196.

6 *Rugh v. Ottenhelmer*, 6 Oreg. 231. And see § 67, *ante*.

7 *Phillips v. Van Schalck*, 37 Iowa, 229.

8 *Rogers v. King*, 66 Barb. 495.

§ 223. **Between proof and bill of particulars.**—It is the office of a bill of particulars to point out the items and particulars embraced in a claim so as to identify them.¹ And it is sufficiently definite and certain if it apprises the party for whose benefit it is given, of the evidence which is to be offered, so that there can be no mistake as to the preparation to be made to resist the claim.² A variance between the proofs and the bill will not therefore be deemed material, unless the opposite party is misled thereby.³

1 *Seaman v. Low*, 4 Bosw. 337. And see § 125, *ante*.

2 *Dubois v. Delaware etc. Canal Co.* 12 Wehd. 334; 15 Wend. 37; *Smith v. Hicks*, 5 Wend. 48.

3 *Seaman v. Low*, 4 Bosw. 337.

§ 224. **Between summons and complaint.**—As it respects *venue*, a variance between the summons and the complaint is immaterial, and the county named in the complaint will control.¹ But in case of a variance between the summons and complaint in respect to the names of parties, the rule is different, and the summons must be considered as controlling the complaint.² A

variance between summons and complaint, as it respects the nature of the cause of action, will be deemed material if the defendant has been, or may have been, thereby misled to his prejudice.³ But a defendant cannot be thus misled when the summons and complaint are served at the same time, and in such case, a variance between them in respect to the relief demanded will be disregarded.⁴

1 *Hotchkiss v. Crocker*, 15 How. Pr. 336; *Merrill v. Grinnell*, 10 How. Pr. 31. See § 8, *ante*.

2 *Allen v. Allen*, 14 How. Pr. 248; *Follower v. Laughlin*, 12 Abb. Pr. 106. See *Hoffman v. Bircher*, 22 W. Va. 537.

3 See *Hemson v. Decker*, 29 How. Pr. 385; *Brown v. Eaton*, 37 How. Pr. 325; *Garrison v. Carr*, 34 How. Pr. 187; 3 Abb. Pr. N. S. 286.

4 *Brown v. Eaton*, 37 How. Pr. 325.

CHAPTER X.

AMENDMENTS.

- § 225. In general — Liberally allowed.
- § 226. As of course
- § 227. Extent of, as of course.
- § 228. Instances of, allowed as of course.
- § 229. Effect of, as of course.
- § 230. Made in bad faith — Remedy.
- § 231. On motion before trial.
- § 232. After demurrer.
- § 233. At the trial.
- § 234. After trial.
- § 235. After remand of cause — On appeal.
- § 236. When considered as made — Defects cured, etc.
- § 237. Instances of allowed — Generally.
- § 238. By whom made.
- § 239. Exercise of discretion in allowing.
- § 240. How made.
- § 241. Terms on allowing.
- § 242. Effect of — Waiver — Practice, etc.

§ 225. In general — Liberally allowed. — Under Codes of Procedure, the most ample provisions exist for the correction of errors and mistakes in pleading: Thus, one general provision is, that the court, in furtherance of justice, and on such terms as may be proper, may amend any pleading, process, or proceeding, by correcting a mistake in the name of a party, or a mistake in any other respect, and may supply an omission in any proceeding.¹ And it is further provided that the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.² The provisions of the Codes authorizing amendments were intended to protect parties when errors had occurred and mistakes had been made, and when

a case comes within the scope of the provisions; and there is no bad faith nor wanton delays imputed to the party applicant, the court should permit the amendment.³ And it is now pretty much a matter of course to permit parties to amend their pleadings before trial, when the amendment will produce no delay of the trial, nor work any especial hardship to the adverse party;⁴ the terms imposed being usually the payment of the costs of the motion, and such other costs and expenses, if any, as the party will lose by reason of the desired amendment.⁵ The leading purpose of the Code provisions on the subject is, to prevent actions from being defeated on grounds that do not affect the merits of the controversy, whenever it can be done by amendment.⁶ And it is said that the largest liberality should be especially permitted in amendments on appeal from Justice's Court.⁷

1 See N. Y. Code Civ. Proc. § 723; Cal. Code Civ. Proc. § 473; 2 Ohio Rev. Stats. § 5114; Colo. Code Civ. Proc. § 75; N. C. Code Civ. Proc. § 132; S. C. Code Civ. Proc. § 196; Kan. Code Civ. Proc. § 139; Oreg. Code Civ. Proc. § 99; Neb. Code Civ. Proc. § 144; Minn. Code Civ. Proc. § 109; *Holmes v. Campbell*, 12 Minn. 221; *Vladero v. Viadero*, 7 Hun, 316.

2 Cal. Code Civ. Proc. § 475; Minn. Code Civ. Proc. § 112; Ind. Code Civ. Proc. § 101; Oreg. Code Civ. Proc. § 104; N. Y. Code Civ. Proc. § 723; Iowa Rev. Code, § 2890; 2 Ohio Rev. Stats. § 5115. A judgment will not be reversed upon the ground of defects in pleadings, when it is apparent upon the face of the record that the parties have had a full trial, that neither party has been prejudiced by reason of such defect, and that substantial justice has been done; *Doniphan v. Street*, 17 Iowa, 317.

3 *Schreyer v. Mayor etc.* 7 Jones & S. 277; *Harrington v. Slade*, 22 Barb. 161; *Kirstein v. Madden*, 38 Cal. 158; *Stringer v. Davis*, 30 Cal. 321; *McMillan v. Dana*, 18 Cal. 343.

4 *Gilchrist v. Gilchrist*, 44 How. Pr. 317; *Union Nat. Bank v. Bassett*, 3 Abb. Pr. N. S. 359; *Bowman v. De Peyster*, 2 Daly, 203.

5 *Gilchrist v. Gilchrist*, 44 How. Pr. 317.

6 *Bullard v. Johnson*, 65 N. C. 436; *Robinson v. Willoughby*, 67 N. C. 84; *Tarrant v. Gittelson*, 18 S. C. 234.

7 *Newberg v. Farmer*, 1 Wash. T. N. S. 182.

§ 226. **As of course.**—Within the times specified in the different Codes, any pleading may be once amended by the party filing or serving it, as a matter of course,

without costs, and without prejudice to the proceedings already had.¹ This right to amend of course is absolute, subject to the power of the court to strike out for cause shown.² And the amended pleading must stand, unless it is made to appear that it is amended for the purpose of delay, and that the adverse party would lose the benefit of a term for which the cause was or may be noticed.³ But a pleading can be amended but once as of course, in the whole course of the action, and if the party deems it important to amend a second time, he must apply to the court.⁴ And it seems, if he has amended his pleading once, though by order of the court, his right to amend of course is gone.⁵ But his right to amend as of course is not lost, unless the change in the pleading amounts to an amendment in fact;⁶ and the fact that portions of a pleading are, on motion, struck out as irrelevant and redundant, cannot be considered an amendment within the meaning of the Code provisions on the subject;⁷ so of an instrument professing to be an amended pleading, which, though in form and phraseology different from the original, in its legal effect amounts to the same thing.⁸ Adding a verification to a complaint is not an amendment;⁹ and a change of parties is held not to be an amendment of pleadings.¹⁰ A party may waive his right to amend as of course by express notice that he will not amend,¹¹ and, according to some of the decisions, noticing the cause for trial is a waiver of the right.¹² But the right is not waived merely by examining the defendant as a witness after joinder of issue and before trial.¹³

¹ See N. Y. Code Civ. Proc. § 542; 2 Ohio Rev. Stat. § 5111; Cal. Code Civ. Proc. § 472; Neb. Code Civ. Proc. § 141; Oreg. Code Civ. Proc. § 97; Ind. Code, § 97; Minn. Code, § 108; *Stilwell v. Kelly*, 5 Jones & S. 418; *Kimball v. Bryan*, 56 Iowa, 632; *Barber v. Reynolds*, 33 Cal. 497; *Allen v. Marshall*, 34 Cal. 185; *Hill v. Supervisors*, 10 Ohio St. 621. Summons cannot be amended of course: *Walkenshaw v. Persel*, 7 Robt. 606; 32 How. Pr 310.

2 *Griffen v. Cohen*, 8 How. Pr. 451; *Ross v. Dinsmore*, 12 Abb. Pr. 41; 20 How. Pr. 323; *Cooper v. Jones*, 4 Sand. 699; *Frank v. Bush*, 2 N. Y. Civ. Proc. R. 250. And see *Ostander v. Conkey*, 20 Hun, 421.

3 *Clifton v. Brown*, 2 N. Y. Civ. Proc. R. 44. See *Allen v. Compton*, 8 How. Pr. 251.

4 *Sands v. Calkins*, 30 How. Pr. 1; *White v. Mayor etc.* 6 Duer, 685; 14 How. Pr. 495; 5 Abb. Pr. 322.

5 *Jeroliman v. Cohen*, 1 Duer, 629; *Sands v. Calkins*, 30 How. Pr. 1.

6 *Jeroliman v. Cohen*, 1 Duer, 629; *Cooper v. Jones*, 4 Sand. 699.

7 *Ross v. Dinsmore*, 20 How. Pr. 323; 12 Abb. Pr. 4.

8 *Snyder v. White*, 6 How. Pr. 321.

9 *George v. McAvoy*, 6 How. Pr. 200.

10 *Billings v. Baker*, 6 Abb. Pr. 213.

11 *Cusson v. Whalon*, 5 How. Pr. 305.

12 *Cusson v. Whalon*, 5 How. Pr. 305; *Phillips v. Suydam*, 54 Barb. 153; 6 Abb. Pr. N. S. 289. But see *contra*, *Clifton v. Brown*, 27 Hun, 231; 2 N. Y. Civ. Proc. R. 44; *Duyckinck v. N. Y. El. R. Co.* 5 N. Y. Civ. Proc. R. 23; 17 Jones & S. 244.

13 *Stilwell v. Kelly*, 5 Jones & S. 417.

§ 227. *Extent of, as of course.*—Amendments as of course will be liberally allowed to almost any extent, provided the facts alleged by way of amendment are only such as serve to explain or perfect the cause of action already presented.¹ A party cannot, by amendment of his pleading before trial, change the whole nature of his cause of action or ground of defense;² and more particularly, a plaintiff cannot, under the form of an amendment of his complaint before trial, change the action from one in tort to one on contract, or the reverse.³ An amendment attempting such a change is properly not an amendment, but a substitution of a cause of action different in nature and substance from that originally stated.⁴ And two tests are given by which to determine whether a second complaint is an amendment or the substitution of a new cause of action, namely: (1) that the same evidence will support both complaints; (2) that the same measure of damages will apply to both;⁵ if both of these tests fail, the new pleading is not an amendment.⁶ Thus, where the first complaint was in trover for cer-

tain goods, and the second charged that the defendant had maliciously sued out a writ of attachment and caused the goods to be seized and sold at a sacrifice, it was held that the latter stated a new and distinct cause of action, and was not an amendment.¹ So, in an action to recover damages for flowing the plaintiff's land, he was not permitted to amend so as to charge the defendant, under the statute, for appropriating the land to his own use.² It is however held in New York, that a plaintiff may amend his complaint of course, by setting forth a new cause of action, and this right is not restricted to setting forth a cause of action of the same class as that contained in the original complaint, but he may, by omitting the original cause of action, insert another of a different class, provided the summons be appropriate to it;³ and it is held that the same principles should be applied to the amendment of answers.⁴ And in allowing amendments to answers, the court does not now regard the character of the defenses sought to be interposed;⁵ any defense, though unconscionable in its nature, as the Statute of Limitations, or usury, may be set up by amendment.⁶ Matters happening subsequent to the original pleading cannot be set up by amendment, but must be presented by supplemental pleading.⁷

1 Rutledge v. Vanmeter, 8 Bush, 354; Taylor v. Moran, 4 Met. (Ky.) 130; Hollister v. Livingston, 9 How. Pr. 140; Stryker v. N. Y. Exchange Bank, 28 How. Pr. 20; 42 Barb. 511; Whitcomb v. Hungerford, 42 Barb. 177; Bailey v. Johnson, 1 Daly, 61; Valencia v. Couch, 32 Cal. 339.

2 Board of Supervisors v. Decker, 34 Wis. 378; Scovill v. Glassner, 79 Mo. 449; Humphrey v. Hughes, 79 Ky. 437; Sweet v. Mitchell, 18 Wis. 641; Stevens v. Brooks, 23 Wis. 196; Wheeler v. Van Denberg, 5 Colo. 508; Givens v. Wheeler, 6 Colo. 149.

3 Board of Supervisors v. Decker, 34 Wis. 378; Lumpkin v. Collier, 69 Mo. 170; Ramirez v. Murray, 5 Cal. 222; Hackett v. California Bank, 57 Cal. 335; Lane v. Beany, 19 Barb. 51.

4 Board of Supervisors v. Decker, 34 Wis. 378.

5 Lumpkin v. Collier, 69 Mo. 170; Scovill v. Glassner, 79 Mo. 449.

6 Scovill v. Glassner, 79 Mo. 449.

7 *Scovill v. Glassner*, 79 Mo. 443.

8 *Newton v. Allis*, 12 Wis. 373.

9 *Brown v. Leigh*, 49 N. Y. 73; 12 Abb. Pr. N. S. 193. And see *Strong v. Dwight*, 11 Abb. Pr. N. S. 319; *Mason v. Whitely*, 4 Duer, 611; *Wyman v. Redmond*, 18 How. Pr. 272; *Fleiden v. Caselli*, 16 Abb. Pr. 289; 26 How. Pr. 173. But compare *Reeder v. Sayre*, 70 N. Y. 180; *Woodruff v. Dickie*, 31 How. Pr. 164; *Diamond v. Williamsburgh Ins. Co.* 4 Daly, 494; *Robertson v. Robertson*, 9 Daly, 44.

10 *Brown v. Leigh*, 49 N. Y. 73; 12 Abb. Pr. N. S. 193; *Diamond v. Williamsburgh Ins. Co.* 4 Daly, 494.

11 *Barnett v. Meyer*, 10 Hun, 109.

12 *Queen v. Babcock*, 41 Barb. 337; 22 How. Pr. 229; 13 Abb. Pr. 283; 3 Abb. Ct. App. 129; 3 Keyes, 423; *Bowman v. De Peyster*, 2 Daly, 203; *Gilchrist v. Gilchrist*, 44 How. Pr. 317; *Union Nat. Bank v. Bassett*, 3 Abb. Pr. N. S. 356.

13 *Anthony v. Day*, 5 N. Y. Week. Dig. 240; *Hornfager v. Hornfager*, 6 How. Pr. 13; *Sheldon v. Adams*, 41 Barb. 54; 27 How. Pr. 17; 13 Abb. Pr. 405; *Lampson v. McQueen*, 15 How. Pr. 345; *Van Maren v. Johnson*, 15 Cal. 308; *McCaslan v. Latimer*, 17 S. C. 123.

§ 228. **Instances of, allowed as of course.**—A plaintiff may amend his complaint by striking out one of the causes of action;¹ so a pleading may be amended of course by adding a new and distinct cause of action or defense,² provided the new cause of action be not inconsistent with the one stated in the original complaint.³ So the plaintiff may amend his complaint by changing the place of trial;⁴ and it was held that he may change his prayer for relief, as by adding to a claim for damages a prayer for an injunction;⁵ but a complaint cannot regularly be amended as to parties, without a corresponding amendment of the summons.⁶ An amendment seeking a different or an enlarged relief does not set up a new cause of action,⁷ and much less does a prayer for a greater amount of damages, when the injury for which they are claimed is the same previously declared on.⁸ But a complaint setting up a purely legal cause of action cannot be amended as of course so as to set up a cause of action in equity.⁹ A complaint on a note, and to foreclose a mortgage securing it, may be amended without leave, at any time before trial, by the withdrawal of so much as relates to

the mortgage.¹⁰ A defendant sued by a fictitious name is a party to the action from its commencement,¹¹ and an amendment to the complaint by inserting the true name does not change the cause of action.¹² Amending a complaint in an action to recover for goods sold and delivered, by striking out certain allegations as to fraudulent representations made by the purchaser, does not change the cause of action, such allegations being unnecessary.¹³ The right to amend as of course includes the right of a defendant to withdraw a demurrer and serve an answer instead.¹⁴ So a defendant may amend his answer by omitting or withdrawing a defense or counter-claim.¹⁵

1 *Watson v. Rushmore*, 15 Abb. Pr. 51.

2 *Townsend v. Platt*, 3 Abb. Pr. 323; *McQueen v. Babcock*, 22 How. Pr. 223; 3 Keyes, 428. See *McGraw v. Godfrey*, 56 N. Y. 610. And see *Williams v. Randon*, 10 Tex. 74; *McLane v. Paschal*, 62 Tex. 102.

3 *Sheldon v. Adams*, 41 Barb. 54; 27 How. Pr. 179; *Van Syckels v. Perry*, 3 Robt. 621. And see *Tierman v. Woodruff*, 5 McLean, 135. Compare *Brown v. Leigh*, 49 N. Y. 78; 12 Abb. Pr. N. S. 193.

4 *Stryker v. N. Y. Exchange Bank*, 28 How. Pr. 20; 42 Barb. 511; *Toll v. Cromwell*, 12 How. Pr. 79.

5 *Getty v. Hudson River Railroad Co.* 6 How. Pr. 269.

6 *Walkenshaw v. Perzel*, 7 Robt. 606; 32 How. Pr. 310; *Russell v. Spear*, 5 How. Pr. 142; *Follower v. Laughlin*, 12 Abb. Pr. 105.

7 *Raleigh v. Cook*, 60 Tex. 438.

8 *Raleigh v. Cook*, 60 Tex. 438; *Porterfield v. Taylor*, 60 Tex. 264; *Chapman v. Sneed*, 17 Tex. 428. See as to the power of the court to amend the complaint so as to demand judgment for a larger amount: *Reed v. Mayor etc.* 97 N. Y. 620.

9 *Carmichael v. Argard*, 52 Wis. 607; *Kavanagh v. O'Neill*, 53 Wis. 101; *Gray v. Brown*, 15 How. Pr. 558. But compare *Getty v. Hudson River R. R. Co.* 6 How. Pr. 269; *Beck v. Allison*, 56 N. Y. 366; *Robinson v. Willoughby*, 67 N. C. 84; *Newell v. Newell*, 14 Kan. 202.

10 *Sayers v. First Nat. Bank*, 89 Ind. 230.

11 *Sacramento v. Spencer*, 53 Cal. 737.

12 *Farris v. Merritt*, 63 Cal. 118.

13 *Hitchcock v. Baere*, 17 Hun, 604.

14 *Robertson v. Bennett*, 1 Abb. N. C. 476; *People v. Whitwell*, 62 How. Pr. 383; *Frank v. Bush*, 2 Civ. Proc. 250; 63 How. Pr. 282. An amended complaint which radically changes the cause of action may be demurred to, without a withdrawal of the answer to the original complaint: *Kellar v. Bare*, 62 Iowa, 468.

15 *Branagan v. Palmer*, 5 N. Y. Week. Dig. 521.

§ 229. **Effect of, as of course.**—An amendment of any pleading as of course, does not prejudice proceedings already had.¹ But an amended pleading supersedes the original, and the original ceases to perform any other functions as a pleading.² Thus, where the change in a complaint consists merely in more fully setting forth the cause of action defectively alleged in the original, the old complaint ceases to be the complaint in the case, or to perform any further function, as a pleading, and the amended complaint falls into its place and performs the same, and not different functions.³ So, where an amended answer has been served, the issue is to be tried upon it as a substitute for the original answer, which is no longer to be treated as a pleading in the cause.⁴ The amendment of a complaint relates back to the commencement of the action, which dates from the filing of the original complaint and issuing of summons thereon,⁵ and may therefore prevent the Statute of Limitations from barring a cause of action not included in the original.⁶ In Iowa, an amendment to a pleading which does not state nor imply that it is designed as a substitute for the original, will be construed in connection with the original;⁷ both must be considered together.⁸ So, by answering the allegations of both the original and amended complaint, the objection that the original is superseded by the amended pleading is waived, and both will be considered as consolidated.⁹

1 See N. Y. Code Civ. Proc. § 542.

2 *Sands v. Calkins*, 30 How. Pr. 1; *Dann v. Baker*, 12 How. Pr. 521; *Fry v. Bennett*, 9 Abb. Pr. 45; 3 Bosw. 200; *People v. Hunt*, 1 Idaho N. S. 433.

3 *Gillman v. Cosgrove*, 22 Cal. 356; *Barber v. Reynolds*, 33 Cal. 497; *People v. Hunt*, 1 Idaho N. S. 433; *Null v. Jones*, 5 Neb. 500; *Brown v. Galena Min. Co.* 32 Kan. 523.

4 *Kapp v. Barthan*, 1 Smith, E. D. 622; *Hanscom v. Herrick*, 21 Minn. 9. And see *Bank v. Telegraph Co.* 30 Ohio St. 555; *Dunlap v. Robinson*, 12 Ohio St. 530. But the original answer may be received in evidence, subject to explanation: *Fogg v. Edwards*, 20 Hun, 90; *Strong v. Dwight*, 11 Abb. Pr. N. S. 319.

5 *Barber v. Reynolds*, 33 Cal. 497. An amended complaint is to be held as stating the cause of action as it existed when the suit was instituted: *Worley v. Moore*, 97 Ind. 15. And see *Ryan v. Railroad Co.* 21 Kan. 365; *Brown v. Galena Min. Co.* 32 Kan. 524.

6 *Ward v. Kalbfleisch*, 21 How. Pr. 283. But see *Sheldon v. Adams*, 18 Abb. Pr. 405; *Evangelical Lutheran Church v. Fingar*, 11 N. Y. Week. Dig. 460; *Anderson v. Meyers*, 50 Cal. 525; *Jeffers v. Cook*, 53 Cal. 151.

7 *Kostendader v. Pierce*, 37 Iowa, 645.

8 *Pharo v. Johnson*, 15 Iowa, 560.

9 *Kline v. Corey*, 18 Hun, 524.

§ 230. **Made in bad faith—Remedy.**—If it be made to appear to the court that the amendment was made in bad faith, and for the purpose of delay, the remedy of the party aggrieved is by motion to strike it out.¹ And if the amended pleading be stricken out, the parties are returned to their former position.² If the amendment is made in good faith, and not for the purpose of delay, it cannot be stricken out, although the effect may be to deprive the opposite party of the benefit of a circuit or term.³ In some cases a party may determine for himself that the amendment was for the purpose of delay;⁴ but as a general rule, it is for the court to pass in the first instance upon the propriety of the amendment.⁵ If a party seeks to make an unauthorized amendment, the remedy is to refuse to accept, or to return promptly the amended pleading, or give notice that it would be disregarded, specifying on what ground.⁶

1 N. Y. Code Civ. Proc. § 542; *Ostrander v. Conkey*, 20 Hun, 421; *Frank v. Bush*, 63 How. Pr. 282; 2 Civ. Proc. R. 250.

2 *Frank v. Bush*, 63 How. Pr. 282; 2 Civ. Proc. R. 250.

3 *Griffen v. Cohen*, 9 How. Pr. 451, 453.

4 See *Allen v. Compton*, 8 How. Pr. 231; *Vanderbilt v. Bleeker*, 4 Abb. Pr. 289; *Farrand v. Herbeson*, 3 Duer, 655.

5 *Griffin v. Cohen*, 8 How. Pr. 451; *Thompson v. Minford*, 11 How. Pr. 273.

6 *Hollister v. Livingston*, 9 How. Pr. 140. Compare *Goodwin v. Robinson*, 30 Ark. 535; *Spencer v. Tooker*, 21 How. Pr. 333; 12 Abb. Pr. 353; *Mayer v. Woodbury*, 14 Iowa, 57.

§ 231. **On motion before trial.**—Amendments to pleadings before trial are liberally allowed upon applica-

tion made with reasonable diligence.¹ The court will grant the leave whenever it can see that justice will be furthered thereby, on some reasonable excuse being shown for the defect sought to be rectified.² Indeed, the power of the court in this respect is said to be without limit, if sound discretion be exercised in granting the permission.³ The general rule is to allow an amendment in furtherance of justice, within the exercise of a sound discretion, and to refuse is the exception.⁴ And courts may sometimes commit substantial error by refusing to permit amendments to pleadings in furtherance of justice.⁵ It is the duty of the courts to allow parties to perfect their pleadings when affected by unintentional error, but they have power to impose reasonable terms as the condition of amendment.⁶ Under the provisions of the Codes, the court may amend by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case.⁷ But it is held, that the court has no power to allow an amendment to a complaint which substitutes one cause of action for another;⁸ as, for instance, an amendment changing the action from one for a separation to one for an absolute divorce.⁹ And leave to amend by setting up a new cause of action, which is at the time barred by the Statute of Limitations, should not be allowed.¹⁰ But the court may, at any time before trial, allow the defendant to amend his answer by setting up a new defense.¹¹ And according to some of the decisions, no discrimination is to be made by the court, in respect to granting leave to amend answers before trial, between defenses which are meritorious, and other legal defenses, such as the Statute of Limitations, formerly considered unconscionable.¹² But in Wisconsin,

in actions between individuals it is not an abuse of discretion to refuse to permit the answer to be amended so as to set up the Statute of Limitations;¹³ though in actions against counties, a different rule is sanctioned for peculiar reasons applicable to such defendant corporations.¹⁴ Leave to amend may be denied on the ground of delay in making the application;¹⁵ but not where such delay is attributable to the negligence of the other party.¹⁶ And on an application to amend the answer in actions against public corporations, the doctrine of *laches* is not to be as rigidly applied as in actions against individuals or private corporations.¹⁷ Applications for leave to amend are favorably regarded on behalf of public corporations.¹⁸ A defendant having leave to amend several defenses in his answer may amend by setting up one defense only.¹⁹

1 *Gilchrist v. Gilchrist*, 44 How. Pr. 317; *Viadero v. Viadero*, 7 Hun, 316; *Schreyer v. Mayor etc.* 7 Jones & S. 277; 66 N. Y. 656; *Crocker v. Crocker*, 1 Sheld. 274.

2 *Harrington v. Slade*, 22 Barb. 161; *Pierson v. McCahill*, 22 Cal. 127; *Stringer v. Davis*, 30 Cal. 321.

3 *Byrnes v. Dunn*, 6 N. Y. Week. Dig. 140.

4 *State v. Mayor etc.* 18 Iowa, 383; *Brockman v. Berryhill*, 16 Iowa, 183; *Miller v. Perry*, 38 Iowa, 301; *Hedges v. Roach*, 18 Neb. 674; *Henderson v. Morris*, 5 Oreg. 24; *Clark v. Clark*, 20 Ohio St. 128.

5 *Koons v. Price*, 40 Ind. 164; *Bailey v. Kay*, 50 Barb. 110; *Stringer v. Davis*, 30 Cal. 318; *Schleffelin v. Whipple*, 10 Wis. 81; *Wright v. Bacheller*, 16 Kan. 253; *Smith v. Yreka Water Co.* 14 Cal. 201.

6 *McGee v. Piedmont Manuf. Co.* 7 S. C. 263; *Clune v. Sullivan*, 56 Cal. 249. As to terms, see *Harrington v. Slade*, 22 Barb. 161; *Tooker v. Arnoux*, 1 N. Y. Month. Law Bull. 54; *Havemeyer v. Havemeyer*, 62 How. Pr. 478; 1 Civ. Proc. R. 448; *Smith v. Rathbun*, 13 Hun, 47; 75 N. Y. 122. If leave is given a defendant to put in an amended answer, provided no matter be set up therein which will affect orders previously made in the cause, such amended answer will be stricken out if it is incompatible with the terms upon which the leave was granted: *Crump v. Thomas*, 89 N. C. 241.

7 See N. Y. Code Civ. Proc. § 723; 2 Ohio Rev. Stats. § 5114; Cal. Code Civ. Proc. § 473; *Well v. Martin*, 24 Hun, 645; 1 Civ. Proc. R. 133; *Chittenaugo Cotton Co. v. Stewart*, 67 Barb. 423; *Travis v. Tobias*, 8 How. Pr. 333; *New York Milk Pan Co. v. Remington Works*, 25 Hun, 475; *Farris v. Merritt*, 63 Cal. 118. A bill of particulars annexed to the complaint, and forming part of it, is amendable; *Melvin v. Wood*, 4 Abb. Pr. N. S. 438; 3 Keyes, 533; *Teberg v. Swenson*, 32 Kan. 224; 4 Pacif. L. Rep. 83; *Mo. Pacif. R. R. Co. v. Piper*, 26 Kan. 58.

8 *Van Syckels v. Perry*, 3 Robt. 621; *Robertson v. Robertson*, 9 Daly, 44; 9 Week. Dig. 348; *Givens v. Wheeler*, 5 Colo. 598. *Barnes v. Quigley*, 59 N. Y. 285; *Parker v. Rodes*, 79 Mo. 83. Compare § 226, *ante*; *Ford v. Ford*, 35 How. Pr. 321; 53 Barb. 525. When all the facts alleged in a complaint will not entitle a plaintiff to any relief, facts essential to the cause of action, occurring after the commencement of the action, cannot be incorporated into the complaint by amendment: *McCullough v. Colby*, 4 Bosw. 603.

9 *Robertson v. Robertson*, 9 Daly, 44; *Ohly v. Ohly*, 11 N. Y. Week. Dig. 129; 3 N. Y. Month. Law Bull. 12.

10 *Evangelical Luth. Church v. Fingar*, 11 N. Y. Week. Dig. 460; *Pottier v. Matthews*, 1 N. Y. Week. Dig. 12; *Van de Haar v. Van Domseller*, 56 Iowa, 671; *Quimby v. Claflin*, 15 N. Y. Week. Dig. 332; 27 Hun, 611. Compare *Risley v. Phoenix Bank*, 2 Hun, 342.

11 *Diamond v. Williamsburg Ins. Co.* 4 Daly, 494. If a defendant has, from a misconception of his rights, want of knowledge, or other excusable cause, omitted to avail himself of a defense, it is always in furtherance of justice to permit him to set it up upon proper terms, if the application is made in good faith, and the allowing of it will work no injustice to the plaintiff: *Bowman v. De Peyster*, 2 Daly, 203. Compare *Loaners' Bank v. Jacoby*, 10 Hun, 143; *Cocks v. Radford*, 13 Abb. Pr. 207; *Hughes v. Heath*, 9 Abb. Pr. N. S. 275; *Graves v. Cameron*, 9 Daly, 152; *McLane v. Paschal*, 62 Tex. 105. A supplemental reply, alleging material facts which occurred after the former reply, is properly allowed to be filed: *Simpson v. Vose*, 31 Kan. 227.

12 *Gilchrist v. Gilchrist*, 44 How. Pr. 317. And see *Barnett v. Meyer*, 10 Hun, 109; *McQueen v. Babcock*, 41 Barb. 337; 3 Keyes, 423; *Pike v. Bingham*, N. Y. Sup. Ct. 11 Reporter, 750. Compare *Sagory v. Railroad Co.* 21 How. Pr. 455.

13 *Plumer v. Clarke*, 59 Wis. 646. And see *Paine v. Comstock*, 57 Wis. 153; *Smith v. Dragert*, 61 Wis. 222.

14 *Plumer v. Clarke*, 59 Wis. 646; *Wis. Cent. R. R. Co. v. Lincoln Co.* 57 Wis. 137; *Capron v. Supervisors*, 43 Wis. 613; *Baker v. Supervisors etc.* 39 Wis. 444.

15 *Egert v. Wicker*, 10 How. 193; *Gowdy v. Poullain*, 2 Hun, 213; 4 *Thomp. & C.* 543; *Abham v. Boyd*, 4 Daly, 30; *Courtright v. Deeds*, 37 Iowa, 503.

16 *Bradley v. Sheehy*, 2 N. Y. Week. Dig. 589.

17 *Lanney v. Mayor*, 14 N. Y. Week. Dig. 140; *Brooks v. Mayor etc.* 12 Abb. N. C. 350.

18 *Seaver v. Mayor*, 7 Hun, 331.

19 *Decker v. Kitchen*, 21 Hun, 332.

§ 232. *After demurrer.*—Upon the decision of a demurrer, the court may, in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just.¹ If the complaint be defective, demurrer thereto should be sustained, with leave to the plaintiff to amend.² But if no leave to amend be asked for, it is not error to proceed to final judgment against the

plaintiff, without granting leave to amend.³ Or, if it appears to the court that the complaint cannot be so amended as to enable the plaintiff to recover, the defendant is entitled to judgment absolute upon the demurrer.⁴ A plaintiff may be allowed to amend his complaint after a demurrer thereto is overruled, and whether the original complaint was sufficient or not, is then of no consequence.⁵ After demurrer sustained to the defendant's answer, it is in the discretion of the court to allow the defendant to amend.⁶ The effect of an order sustaining a demurrer, with leave to the defendant to amend, is to declare that the averments in the defense demurred to constitute no defense.⁷ If part only of an answer is demurred to, the defendant under leave to amend can only amend the defective portion of the answer, and cannot set up new defenses;⁸ but he may add to the part demurred to anything which would strengthen the defense as originally made, even if such matter had from any cause been passed over and left unanswered in the first pleading.⁹ Taking leave to amend an answer after demurrer sustained, is held to be a waiver of the right to assign error upon the action of the court in sustaining the demurrer.¹⁰

1 N. Y. Code Civ. Proc. § 497. And see § 57, *ante*.

2 Gallagher v. Delaney, 10 Cal. 410.

3 Devoss v. Gray, 22 Ohio St. 152. And see Smith v. Yreka Water Co. 14 Cal. 201.

4 Snow v. Fourth Nat. Bank, 7 Robt. 479.

5 Moore v. Wade, 8 Kan. 380.

6 Gillan v. Hutchinson, 16 Cal. 153; Fish v. Reddington, 31 Cal. 183.

7 Ryan v. Mayor, 10 Jones & S. 202.

8 Fielden v. Carelli, 26 How. Pr. 173; 16 Abb. Pr. 292. See Spencer v. Tooker, 21 How. 336; 12 Abb. Pr. 353.

9 Fielden v. Carelli, 26 How. Pr. 173; 16 Abb. Pr. 292. And see Pierson v. McCahill, 22 Cal. 123.

10 Hurd v. Smith, 5 Colo. 233. And see Kennedy v. Anderson, 98 Ind. 151; § 117, *ante*; Tootle v. Phoenix Ins. Co. 62 Iowa, 362.

§ 233. **At the trial.**—The court may in its discretion, upon the trial, amend by conforming the pleading to the facts proved, where the amendment does not change substantially the claim or defense.¹ Amendments upon the trial are very liberally allowed in furtherance of justice;² but it is in the discretion of the court to refuse to allow them, if in its judgment they are not needed or warranted by the facts of the case.³ The exercise of the power of the court in allowing or refusing them must, in a great degree, depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice.⁴ But where the court permits an amendment to be made to a pleading during the trial, it will be presumed to be made in furtherance of justice, unless the contrary appears from the record.⁵ Generally speaking, when in the course of a trial it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the court should allow amendments on application therefor, on such terms as may be just.⁶ The court may allow additional allegations to be added at the trial;⁷ a pleading may be made to conform to the proof;⁸ and it was held that the only limit to the power of amending the pleadings on a trial is, that it shall not bring in a new cause of action.⁹ The plaintiff must establish the allegations of his complaint, and if they warrant legal relief only, he cannot have equitable relief upon the same evidence.¹⁰ Leave to amend a complaint on the trial so as to change the cause of action from one for equitable relief to one in ejectment is not allowable.¹¹ So, if the action be one of ejectment, the plaintiff cannot be allowed to amend his complaint upon the trial, and proceed as though the action were brought to restrain an unlawful interference with his rights as owner of the adjoining lot.¹² If the *gravamen* of an action is fraud,

the plaintiff having failed to establish the fraud cannot maintain the action on the theory that a liability founded on contract was disclosed by the evidence.¹³ So, if the plaintiff bases his action upon a claim of ownership, he must stand or fall upon that claim, and cannot, on failing to establish such claim, fall back upon an alleged lien.¹⁴ If the action is against the defendants as sureties, it is error to allow an amendment of the complaint on the trial, charging them as principals also.¹⁵ Where a complaint for unlawful conversion contains an allegation waiving the tort, it is not proper to allow an amendment on the trial, striking out the waiver of the tort.¹⁶ So, an amendment changing the action from one on the case to one on express contract is not allowable, either on the trial or on appeal.¹⁷ But in an action on a contract proving to be void under the statute of frauds, the plaintiff was allowed to amend at the trial by claiming the value of the services actually rendered.¹⁸ So an amendment of a complaint on a certificate of indebtedness issued by a municipal corporation, by alleging instead that the debt was due for services, is allowable.¹⁹ So, an amendment of the complaint increasing the amount claimed, without changing the cause of action, may be properly allowed at the trial.²⁰ And allegations of special damage may be added at the trial to meet evidence there offered by the plaintiff.²¹ So an amendment at the trial allowing damages in lieu of specific performance was held to be proper.²² As a general rule, no material amendment can be allowed to a pleading after the cause has been submitted to the jury, or a finding has been announced by the court, and especially if by the amendment the material rights of the opposite party upon the merits of the cause would be affected.²³

1 See N. Y. Code Civ. Proc. §§ 540, 723; *Meyer v. Feigel*, 34 How. Pr. 434; 7 Robt. 122; *Thomas v. Nelson*, 69 N. Y. 118; *Lounsbury v. Purdy*, 18 N. Y. 515; 16 Barb. 378; *Retfig v. Newman*, 99 Ind. 424; *Woolsey v. Trustees etc.* 2 Keyes, 603; 4 Abb. Ct. App. 639; *Hammond v. Railroad Co.* 49 Iowa, 450; *Farmers' Gold Bank v. Stover* 60 Cal. 387.

2 *Kirstein v. Madden*, 38 Cal. 163; *Gillan v. Hutchinson*, 18 Cal. 153; *Hannon v. Gibson*, 14 Mo. App. 53.

3 *Hammond v. Foster*, 4 Mont. 421; *Hoffman v. Rothenberger*, 82 Ind. 474; *Henry v. Cannon*, 88 N. C. 24; *Gilchrist v. Kitchen*, 83 N. C. 20. And see *Parker v. Spencer*, 61 Tex. 153, 164.

4 *Thornton v. Borland*, 12 Cal. 438. And see *Hauck v. Craighead*, 4 Hun. 561; *St. John v. Duncan*, 2 N. Y. Month. Law Bull. 20.

5 *Singer Manuf. Co. v. Doggett*, 16 Neb. 609; *Hedges v. Roach*, 16 Neb. 673.

6 *Stringer v. Davis*, 30 Cal. 318; *Kirstein v. Madden*, 38 Cal. 163; *Hunter v. Hudson River etc. Co.* 20 Barb. 433; *Weldey v. Jones*, 73 Mo. 171.

7 *Woolsey v. Trustees etc.* 2 Keyes, 603; *Simmons v. Lyons*, 55 N. Y. 671; 3 Jones & S. 534; *Secor v. Law*, 3 Trans. App. 328; *Mut. Life Ins. Co. v. Hoyt*, 15 N. Y. Week. Dig. 493. And see *Van Ness v. Bush*, 14 Abb. Pr. 33; *Vibbard v. Roderick*, 51 Barb. 616; *Fraser v. Fraser*, 4 N. Y. Month. Law. Bull. 6.

8 *Meyer v. Feigel*, 34 How. Pr. 434; 7 Robt. 122; *Knapp v. Fowler*, 30 Hun. 512; *Thomas v. Nelson*, 69 N. Y. 118; *Smith v. Flack*, 95 Ind. 110; *Sheridan v. Hopkins*, 11 N. Y. Week. Dig. 328; *Crosby v. Watts*, 9 Jones & S. 203; *Smith v. Insurance Co.* 66 Barb. 556; *Fleld v. Van Cott*, 15 Abb. Pr. N. S. 349; *Farmers' Gold Bank v. Stover*, 60 Cal. 387.

9 *Reeder v. Sayre*, 6 Hun. 562; 70 N. Y. 180. And see *Fogg v. Edwards*, 20 Hun. 90; *Union Bank v. Mott*, 10 Abb. Pr. 372; 18 How. Pr. 503; *Johnson v. Oppenheim*, 43 How. Pr. 433; 12 Abb. Pr. N. S. 419; 63 N. Y. 280; *Van Ness v. Bush*, 14 Abb. Pr. 33.

10 *Stevens v. Mayor etc.* 84 N. Y. 296. Compare *Carmichael v. Argard*, 52 Wis. 607.

11 *Bockes v. Lansing*, 13 Hun. 33; 74 N. Y. 437. And see *Matthews v. Delaware etc. Canal Co.* 20 Hun. 427.

12 *Vrooman v. Jackson*, 6 Hun. 326.

13 *People v. Dennison*, 59 How. Pr. 157; 8 Abb. N. C. 129; 84 N. Y. 272. And see *Parker v. Hodes*, 79 Mo. 88.

14 *Hudson v. Swan*, 83 N. Y. 552.

15 *Smith v. Stagg*, 15 Jones & S. 514; 11 N. Y. Week. Dig. 433.

16 *Cushman v. Jewell*, 7 Hun. 525.

17 *Storrs v. Flint*, 14 Jones & S. 498. It is an abuse of discretion to allow the filing of an amended complaint that does not state a cause of action: *Smith v. Gould*, Sup. Ct. Wis. 20 Northw. Rep. 369; 61 Wis. 31. And see *Pracht v. Ritter*, 16 Jones & S. 509.

18 *Turnow v. Hochstadter*, 7 Hun. 80. And see *Oreg. Steamship Co. v. Otis*, 27 Hun. 432; *Harris v. Tumbidge*, 83 N. Y. 457.

19 *Woolsey v. Trustees etc.* 4 Abb. Ct. App. 639; 2 Keyes, 603.

20 *Dakin v. Insurance Co.* 13 Hun. 122; 77 N. Y. 600; *Miaghavan v. Insurance Co.* 24 Hun. 68; *Knapp v. Roche*, 62 N. Y. 614. And see *Raleigh v. Copk.* 60 Tex. 438. But compare *Hamilton v. Railroad Co.* 15 Abb. Pr. N. S. 318.

21 Miller v. Garling, 12 How. Pr. 203; Clemons v. Davis, 61 Thomp. & C. 523; 4 Hun, 260; Baldwin v. Navigation Co. 4 Daly, 314.

22 Beck v. Allison, 56 N. Y. 366.

23 Holcraft v. King, 25 Ind. 352. Where nothing appears to the contrary, it will be presumed that an amendment to a pleading in the case was made before the case was submitted to the jury: Williams v. McGrade, 18 Minn. 82. Refusal to allow an amendment of the answer is a matter of discretion, and not reviewable on appeal: Gulterman v. Steamship Co. 9 Daly, 119. See Bernheim v. Doggett, 12 Abb. N. C. 316; Harney v. Corcoran, 60 Cal. 314.

§ 234. **After trial.**— Amendments after trial are very cautiously allowed;¹ and the general rule is, that a party who has not sought to amend until after he has been nonsuited is too late to ask for a new trial and an amendment.² But in a case where the complaint might have been amended on the trial, but was not, and proof is given sufficient to constitute a cause of action, the court, after the trial, will amend the complaint *nunc pro tunc*.³ Upon a variance of proof the trial may proceed without an amendment, and if the plaintiff have a verdict, he may move to have the pleading amended to correspond to the facts proved, provided the defendant has not been misled thereby.⁴ In an action against a carrier, where negligence is averred and proved, if the complaint is defective in setting up also a contract, the court may, after verdict, amend the complaint so as to conform the pleading to the proof.⁵ So, in an action on a void special contract, it is not error to permit an amendment of the complaint after verdict in accordance with the proofs, so as to make it go on a *quantum meruit*.⁶ But a complaint cannot be amended to conform to the verdict, if such amendment changes the nature of the cause of action.⁷ Nor can a complaint be amended after verdict by increasing the amount of damages for which judgment is demanded, without setting aside the verdict and granting a new trial, in order to give the defendant an opportunity to defend against the enlarged claim.⁸ And the granting or re-

fusing of leave to amend an answer after verdict is much in the discretion of the court;⁹ and where the question of fact sought to be raised by an amendment has been virtually determined against the defendant by special verdict, there is no error in refusing leave to amend.¹⁰ But an answer which is vague and indefinite may be amended after a verdict, so as to conform to the proof.¹¹ In some States the court, in its discretion, may allow amendments even after judgment.¹² But this power should be sparingly exercised, and only in furtherance of justice.¹³ The court may, however, even after the satisfaction of a judgment in favor of the plaintiff, grant leave to amend the complaint by adding new causes of action, although by so doing the operation of the Statute of Limitations is avoided.¹⁴ A proposed amendment of a complaint to conform to the proofs was held to have been properly refused when offered after the dissolution of an injunction.¹⁵ After verdict or finding, and judgment upon the merits, a defective demand or prayer for relief may be amended to conform the relief to the facts proved.¹⁶

1 See *Houghton v. Skinner*, 5 How. Pr. 420; *Johnson v. McIntosh* 31 Barb. 267; *Saltus v. Genin*, 17 How. Pr. 390; 19 How. Pr. 233; 10 Abb. Pr. 478; 3 Bosw. 639; *Fitch v. Mayor etc.* 9 Daly, 514; 88 N. Y. 500.

2 *Balcom v. Woodruff*, 7 Barb. 13. Where testimony is introduced without objection tending to prove a different issue from that made in the pleadings, the court may, after the trial, permit the pleadings to be amended to conform to the facts proved: *Catron v. Shepherd*, 8 Neb. 308. Compare *Curtis v. Cutler*, 7 Neb. 317.

3 *Coleman v. Playsted*, 36 Barb. 28; 40 N. Y. 341. And see *Sprague v. Litherberry*, 4 McLean, 442; *Pratt v. Railroad Co.* 21 N. Y. 305; *New York etc. Rallw. Co. v. McHenry*, 17 Fed. Rep. 414.

4 *Place v. Minster*, 65 N. Y. 89; *Craig v. Ward*; 36 Barb. 377; 3 Keyes, 387; 4 Walt's Pr. 695.

5 *Lamb v. Railroad Co.* 2 Daly, 454. And see *Emerson v. Bleakley*, 41 How. Pr. 511; 5 Abb. Pr. N. S. 350; *Hall v. Gould*, 13 N. Y. 127; *Dalley v. Houston*, 58 Mo. 361.

6 *Thomas v. Hatch*, 53 Wis. 296.

7 *Andrews v. Bond*, 16 Barb. 633; *Nosser v. Corwin*, 36 How. Pr. 540; *Walter v. Bennett*, 16 N. Y. 250.

8 *Pharis v. Gere*, 31 Hun, 443; *Decker v. Parsons*, 11 Hun, 295; *Bowman v. Earle*, 3 Duer, 631.

9 *Ault v. Wheeler etc. Manuf. Co.* 54 Wis. 300. Additional pleadings to correspond with the issues established by the evidence may be filed after the case has been argued to the jury: *Burke v. Snell*, 42 Ark. 57.

10 *Ault v. Wheeler etc. Manuf. Co.* 54 Wis. 300.

11 *Trippe v. Du Val*, 33 Ark. 811.

12 See 2 Ohio Rev. Stats. § 5114; N. C. Code Civ. Proc. § 132; Mo. Rev. Stats. § 3570; N. Y. Code Civ. Proc. § 723; *McKinney v. Jones*, 55 Wis. 39; *Jones v. Whitsett*, 79 Mo. 188; *Hodge v. Sawyer*, 34 Wis. 397.

13 *Field v. Hawxhurst*, 9 How. Pr. 75; *Egert v. Wicker*, 10 How. Pr. 193; *Jagger v. Cunningham*, 8 Daly, 511; *Fisher v. Gould*, 81 N. Y. 228.

14 *Hatch v. Cent. Nat. Bank*, 78 N. Y. 487. Compare *Shaw v. Cock*, 12 Hun, 173; 78 N. Y. 194; *Williams v. Welles*, 15 Abb. Pr. N. S. 11; *Clinton v. Eddy*, 54 Barb. 54; 37 How. Pr. 23; 1 Lans. 81.

15 *Cabanne v. Spaulding*, 14 Mo. App. 312.

16 *Culver v. Rogers*, 33 Ohio St. 537, 546; *Phillips v. Dugan*, 21 Ohio St. 466; *Draper v. Moore*, 2 Cin. Rep. 167.

§ 235. **After remand of cause—On appeal.**—The power of the court below over amendments to pleadings, after a remand of the cause from the court of review, is not affected by the circumstance of an appeal having been taken.¹ The power to amend is the same as it was before the appeal was taken.² And a refusal to exercise the power in a proper case is an abuse of the discretion of the court.³ When a new trial has been ordered, the court has the same power to allow the parties to amend their pleadings as though the action had never been tried.⁴ And while the court above may send a case back for amendment of pleadings and retrial generally, it has no power to prescribe the character of the amendments to be allowed.⁵ After a reversal and remand of the cause, the court below may, by way of amendment, allow breaches to be assigned on the bond sued on, which were not assigned in the original complaint.⁶ So after reversal, it is within the discretion of the court below to allow the plaintiff to amend his complaint by setting up further allegations of fraud developed upon the first trial.⁷ So, where a complaint demanded judgment for the possession of land under a

deed absolute on its face, which was subsequently decided on appeal to be a mortgage, and a new trial was granted, it was held that the court below had power, when the case came on for trial again, to allow an amendment of the complaint, so as to demand judgment for a foreclosure of the mortgage.⁸ But where on appeal a case is reversed on account of the insufficiency of the complaint, its subsequent amendment as to the defects pointed out by the court of review does not make it good with respect to others not considered.⁹ Amendments may be allowed in the appellate court which do not substantially change the issues tried in the court below.¹⁰ And where an amendment to a pleading might have been ordered by the court on the trial, it may be amended on appeal, so as to conform to the proofs;¹¹ as in an action upon contract, the court may, on appeal from a judgment for the plaintiff, amend the complaint so as to make it conform to the terms of the contract as prayed upon the trial;¹² so an amendment was allowed where a demand not averred had been proved;¹³ so an allegation in the first count of a complaint, as to the amount of the plaintiff's damage, may be amended on appeal to sustain his recovery of a larger sum alleged in his general prayer for judgment for damages.¹⁴ And amendment of an answer containing a defective denial, was allowed on appeal *nunc pro tunc*, so as to plead what was intended, namely, a general denial.¹⁵ In New York, a county court has power to allow an amendment of the pleadings in an action brought there by appeal from a Justice's Court.¹⁶ So in California, on an appeal from the Justice's Court, on questions of law and fact the Superior Court has jurisdiction to allow an amendment to the pleadings, upon such terms as may be just.¹⁷ So in Missouri, a pleading filed before a justice of the peace

may be amended in the appellate court, so as to supply any deficiency or omission therein, when, by such amendment, substantial justice will be promoted.¹² It is held, that the power to amend should not be exercised by the New York court of appeals unless it is clear that no substantial right of the adverse party would be affected.¹⁰

1 Branson v. Oregonian Railw. Co. 11 Oreg. 161; Schreyer v. Mayor etc. 7 Jones & S. 277; Iowa County v. Huston, 43 Iowa, 493. And see Johnston v. Hubbell, Wright, 69.

2 Branson v. Oregonian Railw. Co. 11 Oreg. 161.

3 Gray v. Regan, 37 Iowa, 638.

4 Schreyer v. Mayor etc. 7 Jones & S. 277; Steinfeld v. Levy, 16 Abb. Pr. N. S. 28; Priddle v. Aldrich, 13 How. Pr. 486; McGrane v. Mayor etc. 19 How. Pr. 144; Scott v. Chickasaw Co. 53 Iowa, 47.

5 Branson v. Oregonian Railway Co. 11 Oreg. 161. And see McClendon v. Wells, 20 S. C. 514, 522.

6 Hunt v. Gaylor, 25 Ohio St. 620.

7 Getty v. Spaulding, 58 N. Y. 636.

8 Robinson v. Willoughby, 67 N. C. 84.

9 Rinard v. West, 93 Ind. 353.

10 Grant v. Ludlow, 8 Ohio St. 32; Monroe v. Mining Co. 5 Oreg. 503. An amendment which presents a cause of action or defense not presented or suggested in the pleadings in the court below will not be allowed; Monroe v. Mining Co. 5 Oreg. 509. Under the California Practice Act, a complaint cannot be amended in the Supreme Court so as to make it correspond with the verdict: Hooper v. Wells, 27 Cal. 35. And see Hayne New Tr. & App. § 56; Nevada County etc. Co. v. Kidd, 37 Cal. 303.

11 Hudson v. Swan, 7 Abb. N. C. 324; Smith v. Holland, 61 Barb. 333. And see Knickerbocker Life Ins. Co. v. Nelson, 13 Hun, 321; 7 Abb. N. C. 170; Risley v. Wrightman, 13 Hun, 163.

12 Harris v. Tumbidge, 83 N. Y. 92.

13 Tripp v. Pulver, 2 Hun, 511.

14 Schultz v. Third Av. R. R. Co. 89 N. Y. 242. A new party may be brought in by amendment on appeal: Babcock v. Camp, 12 Ohio St. 33; Grant v. Ludlow, 8 Ohio St. 32. And see Bullard v. Johnson, 65 N. C. 436. If a complaint which is susceptible of amendment is amended before the trial, its previous sufficiency will not be considered on an appeal from the judgment: Orton v. Scofield, 61 Wis. 382.

15 Hoffman v. Railroad Co. 18 Jones & S. 403; 19 N. Y. Week. Dig. 510.

16 Ferguson v. McDonough, 18 N. Y. Week. Dig. 128. But a plaintiff should not be allowed to recover for one cause of action in a Justice's Court, and then on appeal substitute a new cause of action when it becomes apparent he cannot recover on his original complaint: Ayers v. Sherman, 18 N. Y. Week. Dig. 254.

17 Ketchum v. Superior Court, Sup. Ct. Cal. 3 West C. Rep. 490. And see Martinez v. Martinez, 2 New Mexico, 464.

18 *King v. Railroad Co.* 70 Mo. 323.

19 *Fitch v. Mayor etc.* 88 N. Y. 500. Compare *Smith v. Mayor etc.* 37 N. Y. 518; *Bate v. Graham*, 11 N. Y. 237; *Pratt v. Railroad Co.* 21 N. Y. 305.

§ 236. When considered as made—Defects cured, etc.—

Under the Code system, when an imperfect pleading is not demurred to, and the proof on the trial not objected to supplies its defects, the pleading is to be considered as amended to conform to the proof and support the verdict;¹ the case may be disposed of on appeal as though the pleading had been amended on the trial in the court below,² and the verdict and judgment will not be disturbed.³ The court on appeal views with disfavor an objection to the sufficiency of a pleading in the court below when such objection is made for the first time in the court above.⁴ And it is a general principle of law, that where a material fact is stated in a pleading, but stated defectively, the defect will be cured by a verdict or finding, without the necessity of an amendment.⁵ But this principle cannot apply where there is a total omission of an essential allegation;⁶ such defect is radical and incurable.⁷ Nothing will be presumed to have been proved, even after verdict, except what is alleged, or necessarily implied from what is alleged, and where the pleading contains no allegations of facts showing a cause of action, it will not be cured by verdict.⁸ But if the answer avers or confesses a material allegation omitted in the complaint, the defect in the complaint is thereby cured.⁹ And the defendant is entitled to the benefit of admissions in the complaint to sustain a defective answer.¹⁰ So it was held that an answer defective in substance may be cured by averments supplied in the reply.¹¹ But the omission in the complaint of a fact essential to the plaintiff's cause of action, is not cured by pleading it in his reply.¹² After proof and hearing, a formal

amendment of a defective statement in a pleading is not necessary, though it may be otherwise as it respects the total want of an essential allegation.¹³ An amendment joining the husband of a plaintiff in a proceeding to contest a will, being formal, may be made without filing an amended petition.¹⁴

1 Catron v. Shepherd, 8 Neb. 308; Sorrels v. Self, 43 Ark. 451; Healy v. Conner, 40 Ark. 352; Hanks v. Harris, 29 Ark. 323; First Nat. Bank v. Bryan, 62 Iowa, 42; Cady v. Allen, 22 Barb. 388; Coster v. Mayor etc. 43 N. Y. 38; Williams v. Insurance Co. 57 N. Y. 274; Sabine v. Johnson, 35 Wis. 135; Miller v. Spaulding, 41 Wis. 221.

2 Tisdale v. Morgan, 7 Hun. 583; Pofflon v. Volkenning, 11 Hun. 358; Foote v. Roberts, 7 Robt. 17; Harrower v. Heath, 19 Barb. 331.

3 Vassau v. Thompson, 46 Wis. 345; Flanders v. Cottrell, 38 Wis. 564; Bowman v. Van Kuren, 29 Wis. 216; Smith v. Burnes, 2 Kan. 222; Hallan v. Jacks, 11 Ohio St. 632.

4 Moore v. Wade, 8 Kan. 380; Polster v. Rucker, 16 Kan. 115. And see Osburn v. Graves, 11 Oreg. 526.

5 Smith v. Burnes, 8 Kan. 197; Youngstown v. Moore, 70 Ohio St. 133; Houghton v. Beck, 9 Oreg. 325; David v. Waters, 11 Oreg. 448; Glittings v. Baker, 2 Ohio St. 21; Moody v. Arthur, 16 Kan. 419; Hedrick v. Osborne, 99 Ind. 143; Frazer v. Roberts, 32 Mo. 457; Felger v. Etzell, 75 Ind. 417; Eshelman v. Snyder, 82 Ind. 498; Pittsburgh etc. R. R. Co. v. Thornburgh, 98 Ind. 201.

6 Well v. Greene County, 69 Mo. 281; Laithe v. McDonald, 7 Kan. 254; Mack v. City of Salem, 6 Oreg. 275; Fox v. Van Norman, 11 Kan. 214; Welner v. Lee Shing, Sup. Ct. Oreg. 7 Pacif. L. Rep. 111. A complaint on a promissory note which fails to set out the note, or aver that a copy is filed with the pleading, is bad on demurrer, and if objection is made by demurrer, the defect is not cured by verdict: Bairden v. Winsteadley, 99 Ind. 600.

7 Well v. Greene County, 69 Mo. 281; State v. Matson, 38 Mo. 499; Bean v. Gregg, 7 Colo. 499. But the defect may be cured by an amendment after verdict, in North Carolina: Pearce v. Mason, 78 N. C. 37.

8 Harris v. Harris, 10 Wis. 463; Grove v. Kansas, 75 Mo. 672; Home Ins. Co. v. Duke, 75 Ind. 535; Curtis v. Cutler, 7 Neb. 315. And see K— v. H—, 20 Wis. 242; Doty v. Rigour, 9 Ohio St. 533; Cleveland etc. R. R. v. Stachhouse, 10 Ohio St. 567; Carpenter v. Huffstetter, 87 N. C. 273; Falls v. Dailey, 74 Mo. 74.

9 Richards v. White, 7 Minn. 345; Bennett v. Phelps, 12 Minn. 326; Rollins v. St. Paul Lumber Co. 21 Minn. 5; Davis v. Hare, 32 Ark. 386; Haggard v. Wallen, 6 Neb. 271; Turner v. Corbett, 9 Oreg. 79; Bower v. Deldecker, 38 Iowa, 418; Union Ins. Co. v. McGookney, 33 Ohio St. 555; Haddon v. Lundy, 51 N. Y. 320; Campbell v. Coonradt, 22 Kan. 705; Blier v. Fretz, 32 Kan. 329; 4 Pacif. L. Rep. 284.

10 Gebhart v. Sorrel, 9 Ohio St. 461.

11 Deutsch v. Wiggins, 1 Colo. 209. See S. C. reversed, 15 Wall. 539.

12 Webb v. Bidwell, 15 Minn. 473.

13 Gainus v. Cannon, 42 Ark. 503.

14 Sunderland v. Hood, 13 Mo. App. 222.

§ 237. *Instances of allowed—Generally.*—After answer, the plaintiff may amend his complaint of course, and without costs, by changing the venue.¹ He may, in Wisconsin, amend of course by adding new parties.² But new parties are usually brought in upon the order of the court, amending the complaint in this respect.³ And even under a general privilege given to file an amended complaint, new parties cannot be substituted by way of amendment, but must be brought in by an order of the court as just stated.⁴ A mere clerical omission to change a name in a complaint in certain places where it occurred, after leave to amend had been given, was held to be properly remedied after judgment.⁵ A verification of a complaint, if defective, may be amended.⁶ A bill of particulars alleged the issue of the warrant sued on and its assignment to the plaintiff, and an amendment was allowed alleging also the indebtedness.⁷ Where plaintiffs sue as partners, but the complaint fails to allege the existence of a partnership, a demurrer is properly sustained thereto, but the plaintiffs should have leave to amend so as to incorporate the averments as to partnership in the body of the complaint, should they desire so to do.⁸ Where a party sues upon an administrator's bond in his own name, the court may properly permit him to amend by substituting the State as nominal plaintiff.⁹ An amendment may be allowed to cure a defect of mere form, whether it arises from non-observance of a constitutional direction or of a mere statutory one.¹⁰ A complaint unnecessarily setting up one ground of estoppel by anticipation, may be amended at the trial so as to set up another, according to the facts.¹¹ If a complaint does not demand interest, but the case is proper for allowing it, and the judgment gives it, the complaint is amendable in that respect after judgment.¹² In

actions on mechanics' liens, the power of amendment of pleadings will be liberally exercised to save a limitation.¹³ Where in the progress of an action new parties are admitted as defendants, it is incumbent upon the plaintiff to amend his complaint by inserting therein the names of such new parties, and by making proper averments concerning them.¹⁴ Where the plaintiff voluntarily amends his complaint by entering a *nolle prosequi* as to certain causes of action, it is a matter of discretion in the court whether he shall reinstate them.¹⁵

1 Stryker v. N. Y. Exchange Bank, 42 Barb. 511;

2 Mead v. Bagnall, 15 Wis. 154.

3 Salt Lake County v. Golding, 2 Utah, 319. When parties are made plaintiffs to an amended complaint, the presumption obtains that all consented thereto: Weese v. Barker, 7 Colo. 178.

4 Salt Lake County v. Golding, 2 Utah, 319. Where a complaint falls to state a cause of action in the plaintiff, it cannot be amended by adding other parties as plaintiffs, in whose favor a cause of action is shown to exist: State v. Kottaken, 34 Ark. 144.

5 Sanford v. Willetts, 29 Kan. 447. And see Hitchcock v. Merrick, 15 Wis. 522. Where a married woman began an action by her name under a former marriage, an amendment substituting her real name was allowed: Merriam v. Wolcott, 61 How. Pr. 377.

6 Johnson v. Jones, 2 Neb. 128; Lowenstein v. Monroe, 52 Iowa, 231.

7 School District v. Dudley, 28 Kan. 160. And see Kansas City etc. R. R. Co. v. Hays, 29 Kan. 193.

8 Bischoff v. Blease, 20 S. C. 460.

9 State v. Shelby, 75 Mo. 482. And see also Wellman v. Dismukes, 42 Mo. 104; State v. Sandusky, 46 Mo. 377.

10 Ilsley v. Harris, 10 Wis. 95.

11 Schumaker v. Hoeveler, 22 Wis. 43.

12 Hodge v. Sawyer, 34 Wis. 397.

13 Hannon v. Gibson, 14 Mo. App. 33; Mann v. Schroer, 50 Mo. 306; Lackner v. Turnbull, 7 Wis. 105; Broderick v. Poillon, 2 Smith, E. D. 554; 1 Abb. Pr. 319; Duffy v. Brady, 4 Abb. Pr. 432; O'Leary v. Burns, 55 Miss. 171.

14 Vance v. Schroyer, 77 Ind. 501; Levi v. Engle, 91 Ind. 330. And see McCarnan v. Cochran, 57 Ind. 166.

15 Grant v. Burgwyn, 88 N. C. 95.

238. By whom made. — A pleading cannot be altered by any person without the direction of the court, or of another court of competent authority, except in a case

where a party or his attorney is specially authorized by law to amend.¹ And it is held, that since the legislature has prescribed in what cases the court can allow amendments to a pleading, though no negative words are used in the statute, the court is necessarily limited to the cases prescribed by law.² A referee takes the place of the court,³ and has co-extensive power with the court to allow amendments of a pleading,⁴ upon the same terms, and with like effect.⁵ But his power is restricted, like that of the court, to such amendments as do not change substantially the claim or defense.⁶ He cannot permit an amendment setting up the Statute of Limitations;⁷ nor can he amend a complaint so as to change the cause of action from one for equitable relief to one in ejectment.⁸ But he may amend the complaint on the trial by striking out or inserting the name of a party;⁹ and may permit a new bill of particulars to be substituted for that annexed to the complaint.¹⁰ Under a stipulation providing for a trial before a judge, he has the same authority to allow amendments as though the trial were in open court.¹¹ In California, referees have no power to allow parties to alter the pleadings after a case has been submitted to them.¹²

1 N. Y. Code Civ. Proc. § 727.

2 *Robertson v. Robertson*, 9 Daly, 44. Compare *Ford v. Ford*, 53 Barb. 528. Independent of the Code, the right to amend pleadings is an inherent power of the courts: *Glichrist v. Kitchen*, 86 N. C. 25.

3 *Schuyler v. Smith*, 51 N. Y. 309.

4 N. Y. Code Civ. Proc. § 1018; *Knapp v. Fowler*, 18 N. Y. Week. Dig. 230; 30 Hun, 512; 26 Hun, 200; *Joslyn v. Joslyn*, 9 Hun, 383.

5 *Oregon Steamship Co. v. Otis*, 59 How. Pr. 254; *Grattan v. Insurance Co.* 80 N. Y. 231; *Fraser v. Hunt*, 18 N. Y. Week. Dig. 390.

6 *Dougherty v. Vallotton*, 6 Jones & S. 455; *Quimby v. Claffin*, 13 N. Y. Week. Dig. 203; *Niagara Co. Nat. Bank v. Lord*, 33 Hun, 557, 566.

7 *Riley v. Corwin*, 17 Hun, 597.

8 *Bockes v. Lansing*, 13 Hun, 38; 74 N. Y. 437.

9 *Knapp v. Hungerford*, 7 Hun, 588. See *Newman v. Marvin*, 12 Hun, 238.

10 *Melvin v. Wood*, 4 Abb. Pr. N. S. 428.

11 *Clews v. Traer*, 57 Iowa, 459.

12 *De La Riva v. Berreyesa*, 2 Cal. 195

§ 239. **Exercise of discretion in allowing.**—Allowing or refusing amendments to pleadings is a matter resting largely in the discretion of the court, the exercise of which will not be reviewed on appeal, except in cases of abuse;¹ and abuse of the discretion will not be presumed.² An appeal is allowed where the amendment invades some substantial right.³ So the discretion of a referee in denying an amendment will be reviewed, and his decision reversed, when general justice will be promoted, and future litigation will be thereby prevented.⁴ Where the referee, after the evidence was all in, allowed both complaint and answer to be amended so as to conform to the facts, it was held to be no abuse of discretion.⁵ And where the complaint alleged that proper proofs were furnished in an action on an insurance policy, and on the trial, which was before a referee, he gave the plaintiff leave to amend the complaint, by alleging a waiver of the requirement as to proofs, it was held to be within the power of the referee to allow the amendment.⁶ In actions between individuals it is not an abuse of discretion to allow or refuse the defense of the Statute of Limitations by amendment.⁷ So, where the question of fact sought to be raised by an amendment has been virtually determined against the defendant by special verdict, there is no error in refusing leave to amend.⁸ And an inconsistent amendment, or one setting up a forfeiture, should not be allowed.⁹ So when a proposed amendment is but a substantial repetition of a former pleading, the court may in its discretion reject it.¹⁰ So, leave to amend may properly be refused where the

proposed amendment would be open to a motion to make more definite and certain.¹¹ If there be an abuse of discretion in granting an order allowing an amendment to the complaint, it may be reviewed on appeal from the judgment, or from an order upon a motion for a new trial.¹²

1 *White v. Culver*, 10 Minn. 192; *Dyer v. McPhee*, 6 Colo. 174; *Butler v. Paine*, 8 Minn. 324; *Carl v. Transfer Co.* 32 Minn. 101; *M. & M. R. R. Co. v. Finney*, 10 Wis. 388; *Gillett v. Robbins*, 12 Wis. 319; *Gould v. Rumsey*, 21 How. Pr. 97; *Dennis v. Snell*, 54 Barb. 411; *Sayers v. First Nat. Bank*, 89 Ind. 230; *Binnard v. Spring*, 42 Barb. 470; *Gilchrist v. Kitchen*, 86 N. C. 20; *Henry v. Cannon*, 86 N. C. 24; *Sears v. Collins*, 3 Colo. 492; *Trumbo v. Finley*, 18 S. C. 305; *Harney v. Corcoran*, 60 Cal. 314; *Feeney v. Mazelin*, 87 Ind. 226; *Bowles v. Doble*, 11 Oreg. 474.

2 *Hedges v. Roach*, 18 Neb. 673. It is an abuse of discretion to allow the filing of an amended complaint that does not state a cause of action, and an order allowing such a complaint to be filed may be reversed on appeal: *Sup. Ct. Wis. Smith v. Gould*, 20 Northw. Rep. 369; 61 Wis. 31.

3 *Union Bank v. Mott*, 19 How. Pr. 267; 11 Abb. Pr. 42. And see *Sheldon v. Adams*, 27 How. Pr. 179; 41 Barb. 54; *Union Bank of Troy v. Bassett*, 3 Abb. Pr. N. S. 359; *Wright v. Bacheller*, 18 Kan. 259; *Newberg v. Farmer*, 1 Wash. 182.

4 *Coates v. Donnell*, 16 Jones & S. 46. See *Knapp v. Fowler*, 26 Hun, 200; *Woodruff v. Hurson*, 32 Barb. 557; *McPherson v. Ronner*, 8 Jones & S. 448.

5 *Gilbank v. Stephenson*, 31 Wis. 592.

6 *Grattan v. Life Insurance Co.* 80 N. Y. 231.

7 *Eldred v. Oconto Co.* 30 Wis. 206; *Meade v. Lawe*, 32 Wis. 261; *Dehnel v. Komrow*, 37 Wis. 338; *Smith v. Dragert*, 61 Wis. 222; *Plumer v. Clarke*, 59 Wis. 648. And see *Baxter v. State*, 15 Wis. 483; *Fogarty v. Horrigan*, 23 Wis. 142. But see *Gilchrist v. Gilchrist*, 44 How. Pr. 317; *Barnet v. Meyer*, 10 Hun, 109.

8 *Ault v. Wheeler etc. Manuf. Co.* 54 Wis. 300.

9 *Collins v. Singer Manuf. Co.* 53 Wis. 305. And see *Reynolds v. West*, 32 Ark. 244. But see *Brown v. Leigh*, 49 N. Y. 78.

10 *Mayer v. Woodbury*, 14 Iowa. 57; *Goodwin v. Robinson*, 30 Ark. 535. It is an abuse of discretion to allow the filing of an amended complaint which does not state a cause of action: *Smith v. Gould*, 61 Wis. 31.

11 *Shipman v. State*, 43 Wis. 281. An amendment to an answer which withdraws a deliberate material admission should not be allowed at the trial: *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

12 *City of Winona v. Railway Co.* 25 Minn. 323. And see *Lane v. Hayward*, 28 Hun. 583, 584. But see *Hendricks v. Decker*, 35 Barb. 208; *Brown v. McCune*, 5 Sand. 224; *Roth v. Schloss*, 6 Barb. 303; *Ferguson v. McDonough*, 18 N. Y. Week. Dig. 123. If a complaint which is susceptible of amendment is amended before the trial, its previous sufficiency will not be considered on an appeal from the judgment: *Orton v. Scofield*, 61 Wis. 382.

§ 240. *How made.* — When leave to amend a pleading is granted, the amendment should either be incorporated into the pleading, or stated on a separate paper, with a reference to the original, and the amended pleading should be served on the opposite party.¹ If a proposed amendment materially changes the issue, it must, if the opposing party so insist, be actually inserted in the pleading.² Amendment by interlineation is condemned by the courts;³ but when the amendment is short, and scarcely if at all material, the court does not abuse its discretion by allowing the amendment by interlineation.⁴ And a case will not be reversed because a party was allowed so to amend, it being apparent that the adverse party was not prejudiced thereby.⁵ And where the amendment was made orally, and not formally filed, but was taken down by the reporter, treated at the trial as made, and incorporated into the record on appeal, it was treated as an effectual amendment to support the verdict and judgment.⁶ But an application to be allowed to amend a sworn pleading by striking out a word which occurred therein, was held to have been properly refused by the court.⁷ It is held that an amendment to a pleading allowed on the trial does not require to be served, unless such service is made a condition of the allowance;⁸ it becomes a part of the record upon being allowed.⁹ A moving affidavit for leave to amend the complaint, which merely states that the deponent deems the amendment advisable, is insufficient;¹⁰ some cause for the omission to make the proposed amendment when it could be done of right, however slight, should be shown.¹¹ A party who would amend his pleading must state enough in the proposed amendment to show the materiality of it.¹² He must inform the court in what particular he desires an amendment, otherwise there is nothing for the court to act upon.¹³

1 *Livermore v. Bainbridge*, 14 Abb. Pr. N. S. 232 n.; *Eigenman v. Rockport etc. Assoc.* 79 Ind. 41; *Flanders v. Wood*, 24 Wis. 572; *Thompson v. Johnson*, 60 Cal. 292; *Fitzpatrick v. Gebhart*, 7 Kan. 35. An amendment, containing only a more specific description of that which was left uncertain in the original pleading, does not require additional service: *Lewis v. Dennis*, 54 Tex. 487.

2 *Ballou v. Parsons*, 11 Hun, 602. Where a plaintiff amends his complaint in matter of substance, he must serve his amended pleading upon all the defendants, including those in default: *Milliken v. Houghton*, Sup. Ct. Cal. 4 West C. Rep. 221.

3 See *Merchants' Ins. Co. v. Excelsior Ins. Co.* 4 Mo. App. 578; *Simmons v. Rust*, 39 Iowa, 241.

4 *Fitzpatrick v. Gebhart*, 7 Kan. 35.

5 *Simpson v. Greeley*, 8 Kan. 586; *Schneider v. Hosler*, 21 Ohio St. 98.

6 *Kretser v. Cary*, 52 Wis. 574. Where the transcript of record shows an amendment to the petition by interlineation, conforming it to the proof, but fails to show when it was made, it will be presumed that it was made at the time the testimony was introduced, and by leave of court: *Giddings v. Giddings*, 57 Iowa, 297. See *Williams v. McGrade*, 18 Minn. 82.

7 *Simmons v. Rust*, 39 Iowa, 241.

8 *Lane v. Hayward*, 28 Hun, 533.

9 *Lane v. Hayward*, 28 Hun, 533. An order of court permitting a party to amend a pleading need not, as a matter of course, be served on the opposite party: *Holmes v. Campbell*, 12 Minn. 221. A defendant who has appeared in an action is entitled to a notice of application for an amendment by adding a new party: *Kneeland v. Martin*, 2 N. Y. Month. Law Bull. 56.

10 *Bewley v. Equitable Life Ins. Co.* 10 N. Y. Week. Dig. 191.

11 *Bewley v. Equitable Life Ins. Co.* 10 N. Y. Week. Dig. 191.

12 *State v. Homey*, 44 Wis. 615.

13 *Walker v. Walbridge*, 14 Minn. 469; *Kerr v. Reece*, 27 Kan. 323.

§ 241. *Terms on allowing.*—The power to grant amendments is to be exercised on liberal terms.¹ But the terms imposed are wholly discretionary, and not the subject of appeal;² though it is only terms that are just in themselves that can be imposed.³ The general rule is, that amendments should be made at the expense of the amending party, and the adverse party should be indemnified for all additional expense involved in the amendment, and the costs of motion for leave to amend.⁴ A decision of the court at the trial, imposing terms as a condition of granting leave to amend, will be deemed to be acquiesced in, unless an exception is taken at the

time.⁵ And by accepting costs imposed upon the adverse party as a condition of leave to amend, the party is precluded from availing himself of any objection thereto.⁶ Where the plaintiff obtained *ex parte* leave to amend his complaint, and upon the defendant's motion to vacate the order, the court modified it by requiring from the plaintiff an undertaking for costs, it was held that the requirement was within the power of the court.⁷

1 Gillett v. Robbins, 12 Wis. 319.

2 Schermerhorn v. Wood, 30 How. Pr. 316; Vibbard v. Roderick, 51 Barb. 616.

3 Hand v. Burrows, 15 Hun, 481.

4 See Harrington v. Slade, 22 Barb. 161; Union Bank v. Mott, 10 Abb. Pr. 372; 11 Abb. Pr. 42, 43 n.; 19 How. Pr. 267; Fooker v. Arnoux, 10 N. Y. Week. Dig. 132; Tribune Assoc. v. Smith, 8 Jones & S. 99; Nanetty v. Naylor, 2 N. Y. Month. Law Bull. 65, 66; Hand v. Burrows, 15 Hun, 481; Havemeyer v. Havemeyer, 12 Jones & S. 170.

5 Griggs v. Howe, 31 Barb. 100; 2 Abb. Ct. App. 291; 3 Keyes, 166. And see Smith v. Rathbun, 75 N. Y. 121, 126.

6 Grattan v. Methrop. Life Ins. Co. 80 N. Y. 281; 36 Am. Rep. 617.

7 Clune v. Sullivan, 56 Cal. 249.

§ 242. **Effect of—Waiver—Practice, etc.**—An amended complaint in an action is a substitute for the original, and if a right of action did not exist when the original was filed, one cannot be created by filing an amended complaint.¹ Error in rejecting competent evidence at one stage of the trial may be cured by a subsequent amendment, and testimony based upon such amendment, by which it appears that the party was not prejudiced by the rejection of the evidence in the first instance.² Amendment of a complaint by adding a party plaintiff, if alleged in the amended complaint, is admitted if not denied by the answer;³ a demurrer to the complaint admits the addition of the party as alleged, and the court will not inquire into the validity of the order allowing the addition.⁴ The court has power on the trial to allow an amendment of the complaint by striking out an admission, and may order the trial

to proceed on the pleading as amended, when the defendant does not claim to be surprised or unprepared to proceed, and does not ask for time to answer the amended pleading.⁵ The amendment of a complaint to conform to the evidence, although erroneously allowed, is not a ground for setting aside the judgment founded on it, where the evidence tended to establish another cause of action contained in the complaint, and the defendant was, therefore, not damnified by the amendment.⁶ Where the papers, as originally filed in an action of attachment brought in the name of a firm, omit the name of one of the partners, which omission is subsequently cured by amendment, the omission is not such a defect as vitiates the levy or can be taken advantage of by subsequent attaching creditors, or postpones the lien of the levy to that of such creditors.⁷ If leave is given a defendant to put in an amended answer, provided no matter be set up therein which will affect orders previously made in the cause, such amended answer will be stricken out, if it is incompatible with the terms upon which the leave was granted.⁸ Amendments are not allowed when the effect is to deprive the opposite party of his available defenses to a new action ;⁹ and if pleadings are amended by permitting a defendant to make a case against his co-defendants, involving a change of the subject-matter of the original suit, it amounts to bringing a new action on his part, and the defendants cannot be restricted in their pleas, but may set up any legal defense as a matter of right.¹⁰ A referee has power on application to amend the complaint on the trial by inserting new allegations, and may impose as a condition that the defendant be permitted to answer, or demur to the amended complaint ;¹¹ and the plaintiff having taken the benefit of the order to amend, is precluded from objecting to the conditions imposed.¹² An

order allowing a plaintiff to amend by striking out the name of a defendant as improperly joined, after a plea in abatement for such misjoinder is filed, but before it is called up, is not erroneous, no injury appearing to have resulted to any of the parties.¹³ In a proceeding for a mandate, where an amended complaint is filed in the name of the State, it is proper to amend the writ accordingly.¹⁴ An amendment to a complaint in an action of claim and delivery, by inserting an allegation of forcible taking, is within the power and discretion of the court, and is held to dispense with an allegation of a demand before suit.¹⁵ Error in refusing to allow a particular amendment to an answer, is held to be waived if the defendant is subsequently allowed to file a further answer.¹⁶

1 *Brown v. Galena Min. Co.* Sup. Ct. Kan. 4 *Pacif. L. Rep.* 1013; 32 Kan. 528. And see § 228, *ante*.

2 *Harrison v. Forsyth*, 1 Jones & S. 269.

3 *Smith v. Rathbun*, 22 Hun, 150.

4 *Smith v. Rathbun*, 22 Hun, 150.

5 *Conway v. Mayor etc.* 8 Daly, 306.

6 *Robertson v. Robertson*, 9 Daly, 44.

7 *Henderson v. Stetter*, 31 Kan. 56. And see *Stout v. Folger*, 34 Iowa, 71; *Ward v. Howard*, 12 Ohio St. 158.

8 *Crump v. Thomas*, 89 N. C. 241.

9 *Henderson v. Graham*, 84 N. C. 496; *Cogdell v. Exum*, 69 N. C. 464.

10 *Gill v. Young*, 88 N. C. 58.

11 *Smith v. Rathbun*, 75 N. Y. 122.

12 *Smith v. Rathbun*, 75 N. Y. 122. And see *Marvin v. Marvin*, 11 Abb. Pr. N. S. 97; *Bennett v. Van Syckel*, 18 N. Y. 481.

13 *Beall v. Territory*, 1 New Mexico, 507.

14 *Morris v. State*, 94 Ind. 565.

15 *Simmons v. Lyons*, 3 Jones & S. 554; 55 N. Y. 671.

16 *Bowles v. Doble*, 11 Oreg. 474; 5 West C. Rep. 671.

CHAPTER XI.

FORMAL DEFECTS — REMEDIES.

- § 243. In general.
- § 244. Nature and extent of remedy by motion.
- § 245. Motion must point out deficiency.
- § 246. Motion to make definite and certain.
- § 247. Instances of motion to make more definite sustained.
- § 248. Motion to make more definite — when made.
- § 249. Irrelevant matter — surplusage.
- § 250. Redundant and scandalous matter.
- § 251. Multifariousness, inconsistency, etc.
- § 252. Sham pleading — remedy.
- § 253. Frivolous pleading — remedy.
- § 254. When pleadings deemed frivolous.
- § 255. Misnomer.
- § 256. Striking pleading from files — generally.
- § 257. Lost pleadings.

§ 243. In general. — At common law, defects apparent upon the face of a pleading were met by a demurrer — a *general demurrer* going to defects of substance, and a *special demurrer* to defects of form.¹ A demurrer under the Code system is not according to the common law, either a general or special demurrer, but one whose powers and sufficiencies are governed entirely by the Code of the particular State.² As already seen in preceding chapters,³ no pleading is now demurrable unless it is subject to one or more of the objections specified in the statute, as grounds of demurrer.⁴ These grounds embrace defects of substance, but many defects in form which could formerly have been reached by special demurrer, are now remedied by motion.⁵ Generally speaking, if a pleading is correct in substance, but not in form, the remedy is by motion, and not by demurrer, under the Code system.⁶

1 See 1 Chit. Plead. 694; *Thomson v. O'Sullivan*, 6 Allen, 303; *Beatty v. Rundall*, 5 Allen, 441; *Fairfield v. Burt*, 11 Pick. 244; *Snyder v. Croy*, 2 Johns. 428; *Andrews v. Thayer*, 40 Conn. 158.

2 *Renton v. St. Louis*, 1 Wash. 215; § 54, *ante*.

3 Chaps. 3, 7, *ante*.

4 § 41, *ante*; *Marie v. Garrison*, 83 N. Y. 14.

5 See *Renton v. St. Louis*, 1 Wash. 215; *Hampson v. Fall*, 64 Ind. 382; *Union Bank v. Bell*, 14 Ohio St. 200; § 54, *ante*.

6 *Howell v. Frazer*, 6 How. Pr. 221; 1 Code R. 270; *Marie v. Garrison*, 83 N. Y. 14.

‡ 244. *Nature and extent of remedy by motion.*—An application for an order is a motion.¹ Or, as more fully defined, a motion is an application for an order addressed to a court or judge, by a party to a suit or proceeding, or one interested therein.² And defects in pleading, as it respects the form and order of stating facts under the Code system, are to be settled on motion.³ The Codes substantially provide, that when the allegations of a pleading are so indefinite and uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain by amendment.⁴ Under this provision, the sufficiency of pleadings as to certainty, precision, definiteness, consistency of allegation, and to every other variety of defect of allegation, which does not amount to such an absolute omission of fact as to constitute no ground of action or defense, must be taken advantage of, or objected to, by motion.⁵ It is further provided, that irrelevant, redundant, or scandalous matter, contained in a pleading, may be stricken out, upon the motion of a person aggrieved thereby;⁶ and obscene words may be stricken from a pleading on the motion of a party, or by the court of its own motion.⁷ But if there be a semblance of a cause of action or defense set up in the pleading, its sufficiency cannot be determined on motion to strike out as redundant or irrelevant;⁸ the proper way to test the sufficiency of

the pleading is by demurrer or by motion on the trial.⁹ So, a motion to strike out irrelevant or redundant allegations is addressed very much to the discretion of the court, and should be granted only where it is entirely clear that such matter is improper or irrelevant.¹⁰ The power is to be exercised with reluctance and caution.¹¹ And while it is competent for a party to move to make the pleadings of his adversary more definite and certain, he is not bound so to do, and the burden may not be cast upon him by the fault of the pleader.¹² The indefiniteness and uncertainty to be relieved on motion are only such as appear upon the face of the pleading;¹³ and matter dehors the pleading will not be looked to.¹⁴

1 N. Y. Code Civ. Proc. § 768; N. C. Code Civ. Proc. § 345; Cal. Code Civ. Proc. § 1003. And see *Matter of Jetter*, 78 N. Y. 601.

2 Ohio Rev. Stats. § 512L.

3 *Stickney v. Blair*, 50 Barb. 341; *Grannis v. Hooker*, 29 Wis. 65; *Johnston Harvester Co. v. Bartley*, 94 Ind. 131.

4 See N. Y. Code Civ. Proc. § 546; Ohio Rev. Stats. § 5088; Wis. Rev. Stats. § 2653; Dakota Code Civ. Proc. § 129.

5 *Trustees etc. v. Odlin*, 8 Ohio St. 293; *Lorillard v. Clyde*, 86 N. Y. 331; *Hale v. Omaha Nat. Bank*, 40 N. Y. 626; *Pacific Mail Steamship Co. v. Irwin*, 4 Hun, 671; 67 Barb. 277; *Gause v. Knapp*, 1 McCrary, 75; *Mills v. Rice*, 3 Neb. 376.

6 See N. Y. Code Civ. Proc. § 545; Cal. Code Civ. Proc. § 453; Dakota Code Civ. Proc. § 129.

7 Ohio Rev. Stats. § 5087.

8 *Eaton v. Burnett*, 16 Jones & S. 548.

9 *Walter v. Fowler*, 85 N. Y. 621. And see *Lee v. Black*, 1 N. Y. Month. Law Bull. 17; *Robbins v. Palmer*, 5 N. Y. Week. Dig. 537.

10 *Town of Essex v. Railroad Co.* 8 Hun, 361; *People v. Tweed*, 63 N. Y. 201; *Younger v. Duffie*, 26 Hun. 442; *Madden v. Railway Co.* 80 Minn. 453; *Cate v. Gilman*, 41 Iowa, 530. Even a remote probability that allegations contained in a pleading may be pertinent upon the trial of the action by way of explanation, or as connected with the history of the subject-matter of the litigation, is sufficient to protect such allegations from being stricken out as irrelevant, on motion: *Duprat v. Havemeyer*, 18 N. Y. Week. Dig. 439. And the power to strike out can be properly exercised only in favor of a person aggrieved: *Homan v. Byrne*, 14 N. Y. Week. Dig. 175.

11 *Town of Essex v. Railroad Co.* 8 Hun, 361; *St. John v. Griffith*, 1 Abb. Pr. 39.

12 *Clark v. Dillon*, 97 N. Y. 370.

13 *Brown v. Railroad Co.* 6 Abb. Pr. 237.

14 *Brown v. Railroad Co.* 6 Abb. Pr. 237; *Scofield v. Nat. Bank*, 9 Neb. 316. A reference to ascertain facts is improper: *Hopkins v. Hopkins*, 23 Hun. 436.

§ 245. **Motion must point out deficiency.**—A motion to correct a pleading, or to strike out matter therefrom, should set forth with a reasonable degree of certainty the particulars wherein the pleading is defective.¹ Thus, if the motion is to make a pleading more definite and certain, the moving party should state in his motion wherein and in what particular the pleading is not sufficiently definite and certain.² So, a motion to strike out parts of a pleading should indicate the parts to which objection is made in such a manner that they may be clearly ascertained.³ A motion to reform, on the general allegation that the pleadings are irrelevant or redundant, is not sufficient.⁴ The court cannot be required to examine the whole pleading and select the parts to be removed.⁵ And it is even held that a motion to strike out part of a pleading, described by reference to line and page, does not sufficiently specify the part referred to.⁶ And where a specification in a motion to strike out included some matters that ought not to be struck out, it was held that the whole motion should be denied.⁷

1 *Gillmore v. Norton*, 10 Kan. 491; *O'Connor v. Koch*, 56 Mo. 253; *Bowman v. Sheldon*, 5 Sand. 657.

2 *Gillmore v. Norton*, 10 Kan. 491; *Kerr v. Reece*, 27 Kan. 338.

3 *Blake v. Eldred*, 18 How. Pr. 240; *Benedict v. Dake*, 6 How. Pr. 352; *Jackson v. Bowles*, 67 Mo. 603; *Bryant v. Bryant*, 2 Robt. 612.

4 *O'Connor v. Koch*, 56 Mo. 253.

5 *Blake v. Eldred*, 18 How. Pr. 240.

6 *Robinson v. Rice*, 20 Mo. 229; *Patterson v. Hollister*, 32 Mo. 478.

7 *White v. Allen*, 3 Oreg. 103.

§ 246. **Motion to make more definite and certain.**—Generally, under the Code system, if a pleading is sought to be made more definite and certain, the remedy is by mo-

tion.¹ Indefiniteness or uncertainty in a pleading should be presented by a motion that the pleading be made more specific, and is not presented by a demurrer, unless the uncertainty be such as to state no cause of action or defense.² And where a motion is the proper remedy to make a pleading more definite and certain in specified particulars, it is error for the court to treat such motion as a demurrer, and to sustain it as such.³ But the Codes in a few of the States expressly make it a ground of demurrer "that the complaint is ambiguous, unintelligible, or uncertain."⁴ And if the averments are in the alternative, the complaint is held to be ambiguous, and so demurrable, even if either averment states a cause of action.⁵ And in States where a motion is the proper remedy, the fact that a complaint contains other sufficient allegations does not deprive the defendant of the right to have a particular one made more definite and certain.⁶ The exercise of the power to correct pleadings upon motion, rests largely in the discretion of the trial court,⁷ and its action will not be reversed on appeal, where, upon the merits, the substantial rights of the party are not affected.⁸ But a motion to make a pleading more definite and certain should not be granted, unless the pleading is plainly insufficient in this respect.⁹ So, if such motion fails to point out any defects, or to make any suggestion in what respect the pleading should be more specific, and the pleading states facts sufficient to constitute a cause of action or defense, the court commits no error in overruling the motion.¹⁰ Where a denial in an answer is indefinite and uncertain, the remedy is by motion, and not by excluding evidence at the trial.¹¹ So, a counterclaim may be reached by a motion to have it made more definite and certain, if it be defective for uncertainty.¹²

1 Seeley v. Engell, 13 N. Y. 542; Marie v. Garrison, 83 N. Y. 14; 241, *ante*. Mere uncertainty must be taken advantage of by motion in the court below, and cannot be raised for the first time on appeal: Osborn v. Graves, 11 Oreg. 523; 6 West C. Rep. 35.

2 Louisville etc. Railw. Co. v. Shanklin, 94 Ind. 297; Moorman v. Shockney, 95 Ind. 89; Louisville etc. Railw. Co. v. Shanklin, 98 Ind. 573; Madden v. Railw. Co. 30 Minn. 453; Moffatt v. McLaughlin, 13 Hun, 449.

3 Ellis v. Reddin, 12 Kan. 306.

4 Cal. Code Civ. Proc. § 420; Colo. Code Civ. Proc. § 51; Ney. Comp. Laws, § 1103. And see § 54, *ante*.

5 Jamison v. King, 50 Cal. 132.

6 People v. Guardian Soc. 6 N. Y. Week. Dig. 136.

7 Lehnertz v. Railway Co. 31 Minn. 219. And see § 244, *ante*; Reardon v. New York etc. Card Co. 18 Jones & S. 514.

8 Lehnertz v. Railway Co. 31 Minn. 219; Madden v. Railway Co. 30 Minn. 453. That an order denying a motion to make a pleading more definite and certain is appealable: See Arletta v. Morrissey, 1 Abb. Pr. N. S. 459; Brinkerhoff v. Perry, 59 How. Pr. 155. But see *contra*, Dudley v. Grissler, 5 Jones & S. 412. And compare Geis v. Loew, 15 Abb. Pr. N. S. 94; Field v. Stewart, 2 Sweeney, 193; Hughes v. Railw. Co. 13 Jones & S. 114.

9 People v. Tweed, 5 Hun, 353; 63 N. Y. 194; Tilton v. Beecher, 53 N. Y. 176; Brownell v. National Bank, 13 N. Y. Week. Dig. 371.

10 Kerr v. Reece, 27 Kan. 338.

11 Burley v. German American Bank, U. S. Sup. Ct. 5 Civ. Proc. R. 172; Spies v. Roberts, 18 Jones & S. 301; Greenfield v. Life Ins. Co. 47 N. Y. 430, 437. Compare Hughes v. Railway Co. 13 Jones & S. 114.

12 Fetter v. McKay, 11 Abb. Pr. N. S. 453; 47 N. Y. 426. See Clegg v. Am. Newspaper Union, 7 Abb. N. C. 59.

§ 247. **Instances of motion to make more definite sustained.**—In general, if the allegations of a pleading are so indefinite that the nature of what is intended is not apparent, a motion to make more definite and certain will be sustained.¹ Thus, if a complaint leaves it uncertain whether the plaintiff depends upon an affirmance of a contract or its rescission, he may be compelled to make his election by an order made on a motion to make the pleading more definite and certain.² So, a motion to make more definite and certain, or to compel an election, is proper, where the complaint states a cause of action in tort or on contract.³ So, a complaint in an action for services, alleging that they were reasonably worth a specified sum which the defendants

promised and agreed to pay the plaintiffs, was held to be obnoxious to a motion to make more definite and certain, in that it stated two grounds of recovery for a single cause of action.⁴ So, a complaint in an action against a sheriff, which does not show whether it is sought to charge him as bail, or to recover damages for an escape, is obnoxious to a motion to make more definite and certain.⁵ So of a complaint which does not state causes of action separately.⁶ So, if separate defenses set up in the answer are not distinctly stated, the plaintiff's remedy is by motion to make more definite and certain.⁷ So, this is the plaintiff's remedy where the denial in the defendant's answer is in the following form: "Defendant denies each and every allegation therein (in the complaint) contained, except as hereinafter admitted."⁸ A want of certainty in a pleading as to time, when not material to constitute the cause of action or defense, is reached by motion to make more specific, and not by demurrer.⁹ So, in an action for damages resulting from the alleged negligence of the defendant, uncertainty in the allegation of negligence in the complaint is a defect that cannot be reached by demurrer, but by motion to make specific.¹⁰ A complaint to enforce the execution of a trust in lands, merely stating that the defendant holds the legal title in trust, will be ordered to be made more definite by stating the facts that create the trust.¹¹ So, in an action to recover property which the plaintiff alleged he transferred to the defendant, in trust for himself, the plaintiff was required, on motion, to make the complaint more definite by stating the specific real estate which he claimed to have conveyed, and the kind and quantity of personal property.¹² And, generally speaking, if the defendant has a right to be informed, by the complaint, of the particular facts relative to matters

mentioned in it, his remedy is by motion.¹³ But in an action to recover for injuries sustained by the plaintiff while working at a machine while in the defendant's employment, a complaint charging that the plaintiff was injured, without knowledge on her part that the machine was defective, but not specifying in what respect it was defective, was held not to be obnoxious to a motion to make more definite and certain.¹⁴

1 Olcott v. Carroll, 33 N. Y. 436; Tilton v. Beecher, 59 N. Y. 176. An answer is indefinite when the precise nature of the defense is not apparent: Pacific Mail Steamship Co. v. Irwin, 4 Hun, 671; 67 Barb. 277.

2 Faulks v. Kamp, 8 Jones & S. 70.

3 Ladd v. Arkell, 5 Jones & S. 35. Compare Conaughty v. Nichols, 42 N. Y. 88.

4 Gardner v. Locke, 2 Civ. Proc. R. 252; Dorr v. Mills, 3 Civ. Proc. R. 363. See Evans v. Kalbfleisch, 16 Abb. Pr. N. S. 13; Longprey v. Yates, 31 Hun, 432.

5 Nehreshelmer v. Bowe, 3 Civ. Proc. R. 363.

6 Bass v. Comstock, 36 How. Pr. 382; 38 N. Y. 21; Freer v. Denton, 61 N. Y. 492; Forsyth v. Edminston, 11 How. Pr. 408. And see Clark v. Langworthy, 12 Wis. 441; § 52, *ante*.

7 Kerr v. Hays, 35 N. Y. 331.

8 Farnsworth v. Wilson, 5 Civ. Proc. R. 179, n. And see Burley v. German-American Bank, 5 Civ. Proc. R. 172; Spies v. Roberts, 18 Jones & S. 301. If a pleading mingles general with specific allegations, so as to leave the intention of the pleader uncertain and ambiguous as to the nature and extent of the proof which he may offer in addition to the matters particularly alleged, the court may, on the proper application, order the same to be made more definite, or be stricken out: Madden v. Railway Co. 20 Minn. 453. And see Pugh v. Railroad Co. 29 Minn. 300.

9 People v. Ryder, 12 N. Y. 433; Louisville etc. Railw. Co. v. Shanklin, 94 Ind. 297.

10 Pennsylvania Co. v. Sedgwick, 59 Ind. 336; Brookville etc. Turnp. Co. v. Pumphrey, 59 Ind. 73; Ohio etc. Railw. Co. v. Collarn, 73 Ind. 261. See Miller v. Railway Co. 63 Iowa, 630.

11 Horn v. Ludington, 28 Wis. 81.

12 Brinkerhoff v. Perry, 59 How. Pr. 156, n.

13 Spies v. Transportation Co. 5 Duer, 662; Grannis v. Hooker, 29 Wis. 65.

14 Reardon v. Consolidated Card Co. 18 Jones & S. 514. And see Velle v. Insurance Co. 63 How. Pr. 1; 12 Abb. N. C. 369; Butler v. Mann, 9 Abb. N. C. 49; 2 Civ. Proc. R. 240.

2 248. Motion to make more definite—When made.—

A motion to make a pleading more definite and certain

should be made before trial,¹ and it is generally held that an objection for indefiniteness cannot be first taken at the trial.² It is not, however, essential that the motion be made at the earliest possible moment, but where the time "to plead, or otherwise move," has been extended, it may be made at any time before the expiration of such extension.³ Where a defendant has moved to make the complaint more definite and certain, in a respect material to the question whether a receiver should be appointed, it is held that the motion for that relief should be determined before a motion for a receiver.⁴ Where the defendant, before the time for answering expired, demanded a bill of particulars which was furnished by the plaintiff, and the defendant then moved that the plaintiff be required to make his complaint definite and certain, it was held that the motion, if allowable at all in such a case, came too late.⁵

1 *Smith v. Woodruff*, 1 Handy, 276. The objection cannot be raised for the first time on appeal: *Osborn v. Graves*, 11 Oreg. 526.

2 *Farmers' etc. Bank v. Sherman*, 6 Bosw. 181; 29 How. Pr. 573; 33 N. Y. 69; *Germania Bank v. Distler*, 67 Barb. 333; *Bue v. Ketchum*, 51 Wis. 324; *Redmon v. Phoenix Fire Ins. Co.* 51 Wis. 292.

3 *Hammond v. Earle*, 5 Abb. N. C. 105.

4 *People v. Manhattan R. R. Co.* 9 Abb. N. C. 448.

5 *McKinney v. McKinney*, 12 How. Pr. 22.

§ 249. **Irrelevant matter — Surplusage.** — Irrelevant matter in a pleading may be stricken out upon the motion of a person aggrieved thereby.¹ And matter in a pleading is irrelevant, which has no bearing on the question in dispute, does not affect the subject-matter of the controversy, and can in no way affect or assist the decision of the court.² The term "irrelevancy" comprehends both prolixity on needless details of material matter, and also matter out of which no cause of action or defense could arise between the parties.³ Matters of evidence rather than facts alleged in a plead-

ing should be stricken out as irrelevant.⁴ But this rule does not apply to an action in which all the facts to be stated and the evidence of them are synonymous.⁵ Arguments in a pleading may properly be stricken out.⁶ And where so much of an answer as stated the reasons which actuated the defendant in interposing a plea of the Statute of Limitations was, on motion, stricken out as irrelevant, it was held that there was no error.⁷ But an allegation in the nature of an introduction necessary for the intelligent statement of the defense intended will not be stricken out as irrelevant.⁸ And matter in an answer will not be stricken out as irrelevant so long as it is responsive to any matter in the complaint.⁹ And the power of the court to expunge matter from a pleading, upon motion for irrelevancy, refers to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleading against the party moving to expunge, and does not enable a party to strike out allegations relating to himself because they are irrelevant to an alleged cause of action against some other party.¹⁰ And if there is a semblance of a cause of action or defense set up in a pleading, its sufficiency cannot be determined on a motion to strike it out as irrelevant.¹¹ So where irrelevant matter in a pleading can in no way prejudice or injure the other party in the enforcement of his rights, it will not be stricken out on a motion for that purpose, but will be permitted to stand;¹² the power to strike out is limited to matter which may aggrieve the adverse party.¹³ The term "surplusage" is frequently employed to designate irrelevant or superfluous matter in a pleading, and all that a party alleges in pleading, beyond what is necessary to constitute *prima facie* a cause of action or defense, is said to be surplusage.¹⁴ Surplusage in general will not vitiate a pleading,¹⁵ and may be disregarded

upon the trial,¹⁶ or be stricken out on motion.¹⁷ But surplusage in a pleading is not the subject of a demurrer.¹⁸ The motion to strike out irrelevant or superfluous matter should be made before demurring to or answering the objectionable pleading.¹⁹

1 See N. Y. Code Civ. Proc. § 545; Cal. Code Civ. Proc. § 453; *Guthrie v. Fisher*, Sup. Ct. Cal. 5 West C. Rep. 823; *Arata v. Tellurium* etc. Min. Co. Sup. Ct. Cal. 3 West C. Rep. 151.

2 *Jeffras v. McKillop* etc. Co. 2 Hun, 351; 4 *Thomp. & C.* 578; *Straver v. Ocean Ins. Co.* 2 Hilt. 475; 9 Abb. Pr. 23; *Fasnacht v. Stehn*, 53 Barb. 650; 5 Abb. Pr. N. S. 333; *Cahill v. Palmer*, 17 Abb. Pr. 196; 45 N. Y. 473. And see *Kelly v. Waterbury*, 87 N. Y. 179.

3 *Lee Bank v. Kitching*, 7 Bosw. 664; 11 Abb. Pr. 435. And see *Littlejohn v. Greeley*, 13 Abb. Pr. 311; *Clark v. Jeffersonville* etc. R. R. Co. 44 Ind. 248; *Aubrey v. Flske*, 36 How. Pr. 279; 36 N. Y. 47; *Krewson v. Purdom*, 11 Oreg. 266; 3 *Pacif. L. Rep.* 822; *Hawkins v. Furnace Co.* 40 Ohio St. 507; *Buffalo* etc. Oil Co. v. *Everest*, 30 Hun, 586.

4 *Clark v. Ottendorfer*, 2 N. Y. Month. Law Bull. 53; *McCauley v. Long*, 61 Tex. 74; *Bowen v. Aubrey*, 22 Cal. 566; *Cathcart v. Peck*, 11 Minn. 45.

5 *Davenport Glucose Manuf. Co. v. Taussig*, 5 Civ. Proc. R. 69; 13 N. Y. Week. Dig. 403.

6 *Gould v. Williams*, 9 How. Pr. 51.

7 *Nichols v. Briggs*, 18 S. C. 473.

8 *Pac. Mail S. S. Co. v. Irwin*, 4 Hun, 671; 67 Barb. 277. And see *Duprat v. Havemeyer*, 18 N. Y. Week. Dig. 439.

9 *McIntyre v. Ogden*, 17 Hun, 604; *Royal Baking Powder Co. v. Jenkins*, 2 N. Y. Month. Law Bull. 53.

10 *Hagerty v. Andrews*, 4 Civ. Proc. R. 323; 18 N. Y. Week. Dig. 140; 94 N. Y. 195.

11 *Walter v. Fowler*, 85 N. Y. 621. And see *Jackson v. Lebar*, 53 Cal. 257.

12 *Duprat v. Havemeyer*, 18 N. Y. Week. Dig. 439.

13 *Duprat v. Havemeyer*, 18 N. Y. Week. Dig. 439; *Pacific Mail S. S. Co. v. Irwin*, 4 Hun, 671; 67 Barb. 277; *Roman v. Byrne*, 14 N. Y. Week. Dig. 175.

14 *Campbell v. Taylor*, 3 Utah, 325; *Drake v. First Nat. Bank*, Sup. Ct. Kan. 7 *Pacif. L. Rep.* 219.

15 *Russell v. Rogers*, 15 Wend. 351; *Petty v. Trustees* etc. 95 Ind. 230.

16 See 1 *Chitty Plead.* 229; *Ashe v. Gray*, 90 N. C. 137; § 3, *ante*.

17 *McMahon v. Thornton*, 4 Mont. 46; *Love v. Mining Co.* 32 Cal. 63; *Williams v. Scotton*, 19 Wis. 42; *Brooks v. Bates*, 7 Colo. 576; *Drake v. First Nat. Bank*, Sup. Ct. Kan. 7 *Pacif. L. Rep.* 219.

18 *Campbell v. Taylor*, 3 Utah, 325.

19 *New York Ice Co. v. Insurance Co.* 21 How. Pr. 234; 12 Abb. Pr. 74; *Russell v. Chambers*, 31 Minn. 54. And see *Smith v. Countryman*, 30 N. Y. 655. And the motion papers should point out precisely the parts objected to: *Bryant v. Bryant*, 2 Robt. 613; *Blake v. Eldred*, 13 How. Pr. 240; *Bowman v. Sheldon*, 5 Sand. 660.

§ 250. **Redundant and scandalous matter.**—Redundant or scandalous matter may also be stricken out of a pleading on the motion of a person prejudiced thereby.¹ And where the objection to a pleading is that it contains redundant, impertinent, or scandalous matter, it should be corrected by motion and not by demurrer.² The terms "redundant" and "irrelevant" are not equivalent, for although matter which is irrelevant is also redundant, the converse is not true.³ A needless repetition of material averments is redundancy, although the facts averred, so far from being irrelevant, may constitute the whole cause of action.⁴ And it is held, that where matter in a pleading, though clearly redundant, is not prolix, and does not tend seriously to prejudice the opposite party or encumber the record, it will not be stricken out.⁵ Though it has been held on the other hand that the opposite party may always be considered as aggrieved by scandalous, impertinent, or redundant matter in a pleading.⁶ The court has inherent power to strike out scandalous and impertinent matter.⁷ And since the responsibility for the insertion of such matter rests upon the attorney preparing the pleading, he should be charged with the payment of the costs of a motion to strike it out.⁸ But no matter is impertinent, however scandalous it may be, or however much it may tend to degrade, provided it bears upon the point about which the parties are at issue.⁹ And redundant matter in answer which responds to similar matter in the complaint will not be stricken out.¹⁰ A motion to strike out a portion of an answer as redundant, the redundancy consisting in the addition of a general denial to the denial of specific allegations, was denied, and it was held no error.¹¹ But where, in addition to a general denial, the defendant pleaded matter which amounted to nothing more than an argu-

mentative denial, all of which was admissible under the general denial, the striking out of such matter on motion was held no error, as it could not have prejudiced the defendant.¹² Passages of a pleading objected to as impertinent, scandalous, or redundant, must be pointed out with such clearness as to enable the opposite party and the court to ascertain precisely what parts are objectionable.¹³ And the motion to strike out such matter from a complaint will not be considered after answer or demurrer,¹⁴ or even after an order for time to plead.¹⁵ The court, on ordering redundant matter to be stricken out, may, in its discretion, direct the service of an amended complaint.¹⁶ If, after matter is stricken from a pleading, all evidence admissible under the original pleading can still be introduced, the error, if any, in striking out such matter, is immaterial, and the order will be affirmed.¹⁷

1 See N. Y. Code Civ. Proc. § 545; Ohio Rev. Stats. § 5087; § 244, *ante*; *Fraker v. Railroad Co.* 30 Minn. 105; *Smith v. Butler*, 11 Oreg. 46; *Williams v. Sexton*, 19 Wis. 42.

2 *Hayden v. Anderson*, 17 Iowa, 158; *Kinyon v. Palmer*, 18 Iowa, 377; *Kling v. Enterprise Ins. Co.* 45 Ind. 42. And see *Burr v. Burton*, 18 Ark. 215.

3 *Bowman v. Sheldon*, 5 Sand. 657; 10 N. Y. Leg. Obs. 339.

4 *Bowman v. Sheldon*, 5 Sand. 657; 10 N. Y. Leg. Obs. 339. And see *Follett v. Jewett*, 11 N. Y. Leg. Obs. 193.

5 *Clark v. Harwood*, 8 How. Pr. 470; *Denithorne v. Denithorne*, 15 How. Pr. 232; *Brockelman v. Brandt*, 10 Abb. Pr. 141.

6 *Putnam v. De Forest*, 8 How. Pr. 146; *Williams v. Hayes*, 5 How. Pr. 470; *Carpenter v. West*, 5 How. Pr. 53; *Stewart v. Bouton*, 6 How. Pr. 71.

7 *Mussina v. Clark*, 17 Abb. Pr. 188; *Bowman v. Sheldon*, 5 Sand. 657; 10 N. Y. Leg. Obs. 339; *Opdyke v. Marble*, 18 Abb. Pr. 236, 375; 44 Barb. 64.

8 *McVey v. Cantrell*, 8 Hun, 522.

9 *Powell v. Cobb*, 3 Jones Eq. 1; *Goodrich v. Parker*, 1 Minn. 136.

10 *McIntyre v. Ogden*, 17 Hun, 604.

11 *Homan v. Byrne*, 14 N. Y. Week. Dig. 175.

12 *De Forrest v. Butler*, 62 Iowa, 78. A city charter is a public law, of which courts take judicial notice, and a recitation of its provisions in a complaint may be stricken out as redundant: *Durch v. Chipewa County*, 60 Wis. 227.

13 *Whitmarsh v. Campbell*, 1 Paige, 645; *Dryant v. Bryant*, 2 Robt. 612.

14 *N. Y. Ice Co. v. Ins. Co.* 21 How. Pr. 234; 12 Abb. Pr. 74; *Best v. Clyde*, 86 N. C. 4.

15 *Best v. Clyde*, 86 N. C. 4.

16 *Durch v. Chippewa County*, 60 Wis. 227.

17 *Sloteman v. Mack*, 61 Wis. 578. And see *De Forrest v. Butler*, 62 Iowa, 78.

§ 251. **Multifariousness, inconsistency, etc.**—Multifariousness is the improper joinder in one complaint or petition of distinct and independent matters, each of which would constitute a separate cause of action.¹ Redundant or irrelevant matter which may be stricken out on motion does not constitute multifariousness,² and this objection to a pleading is usually raised by demurrer, under the Code system.³ But in Arkansas, multifariousness cannot be corrected by demurrer, but only by a motion to strike out.⁴ So, in Kentucky a motion to strike out is held to be the appropriate mode of making the objection.⁵ And in Dakota the objection may be taken by demurrer, by motion to strike out, or, it seems, by a motion to compel the plaintiff to elect upon which cause of action he will proceed.⁶ If the facts stated in a complaint or petition constitute a single cause of action, and the prayer asks for inconsistent forms of relief, the remedy is by motion, and not by demurrer, for misjoinder of different causes of action.⁷ Matter in a complaint anticipating a defense is not proper, and upon motion to strike out, such matter should be rejected.⁸ Where matter in the nature of a counter-claim was set up as "a second answer, defense, and counter-claim," it was held that the remedy for doubt as to whether the defendant intended it as a counter-claim, such as should be admitted by a failure to reply, was by special motion.⁹ So, if a complaint contains a statement of the facts necessary to constitute two distinct causes of action, and the plaintiff fails to

separately state and number them, the remedy for any doubt as to which cause of action the plaintiff intends to rely upon is by a motion to make the complaint more definite and certain.¹⁰

1 *McGlothlin v. Hemery*, 44 Mo. 350; *McMahon v. Thornton*, 4 Mont. 51; *Story Eq. Plead.* 271 b. And see *Robinson v. Rice*, 20 Mo. 229; *Bowers v. Keesecher*, 9 Iowa, 422; *Gaines v. Chew*, 2 How. 642; *Warren v. Warren*, 56 Me. 334.

2 *McGlothlin v. Hemery*, 44 Mo. 350.

3 *Green v. Taney*, 7 Colo. 278; 2 West C. Rep. 531. And see § 52, *ante*.

4 *Terry v. Rosell*, 32 Ark. 478; *Dyer v. Jacoway*, 42 Ark. 186.

5 *Hancock v. Johnson*, 1 Met. (Ky.) 242.

6 *Fraley v. Bentley*, 1 Dakota, 25.

7 *Colstrum v. Railway Co.* 31 Minn. 367.

8 *Brooks v. Bates*, 7 Colo. 576.

9 *Commercial Bank v. Pfeiffer*, 22 Hun, 327, 337. And see also *Booher v. Goldsborough*, 44 Ind. 490; *Kinney v. Miller*, 25 Mo. 576.

10 *Commercial Bank v. Pfeiffer*, 22 Hun, 327; *Frier v. Denton*, 61 N. Y. 492. And see § 52, *ante*.

§ 252. **Sham pleading—Remedy.**—The essential element of a sham pleading is falsity.¹ The words "sham" and "false" as used in this connection are synonymous.² A sham answer or defense is, therefore, one false in fact, and not pleaded in good faith, but which may be good in form.³ The test is, untruth in fact, and the answer may be sham, although the defendant believed it true.⁴ At common law, a sham plea was liable to be struck out upon motion, and the provision made in many of the Codes for striking out sham answers or defenses⁵ is said to confer no new power, but is simply declaratory of a power the courts before possessed.⁷ It is, however, the rule in some of the States, that an answer or defense of new matter affirmatively pleaded may be stricken out, upon satisfactory evidence clearly showing it to be sham, whether verified or not,⁸ and an answer containing only general denials may be stricken out as sham.⁹ Under the rule in Indiana, any pleading may be rejected as a sham

pleading where, upon its face, it is clearly false in fact, or is shown to be false by the answers to interrogatories propounded for the purpose of testing it.¹⁰ In New York, the right to strike out as sham extends to such affirmative defenses as are not verified by the oath of the defendant, or other equivalent evidence.¹¹ In order to strike out an answer on information and belief as sham, it must be shown clearly that there was no such information or belief.¹² But where it uncontradictedly appears that the defendant must have personal knowledge of the allegations denied by him "on information," it is held that such denial may be stricken out as sham;¹³ though the settled doctrine in that State is, that where a general denial is properly verified by the oath of the defendant, such general denial cannot be stricken out on motion as sham.¹⁴ And such is also the rule in California.¹⁵ An unverified answer to a verified complaint will be stricken out, on motion, as sham and frivolous.¹⁶ Where an answer alleging usury entirely on information and belief is shown by affidavit to be false, it will, in the absence of explanatory affidavits, be stricken out as sham.¹⁷ So in an action to enforce a foreign judgment, an answer denying any knowledge or information sufficient to form a belief as to all the material allegations of the complaint will be stricken out as sham, where the defendant appeared in the original action.¹⁸ Part of an entire answer, or part of an entire defense, cannot be stricken out as sham.¹⁹ So a demurrer is not a "defense," in the sense that it may be stricken out as sham.²⁰ And a motion to strike out defenses in an answer as sham should be denied, where the defendant interposed an affidavit that the answer was put in in good faith, and not for delay, and made an affidavit of merits.²¹ But if circumstances occur after answer served, whereby a defense set up

therein becomes false, the defense may be struck out, as where a pending action has been discontinued.²²

1 Winslow v. Ferguson, 1 Lans. 436; Fettretch v. McKay, 11 Abb. Pr. N. S. 453; Ostrom v. Bixby, 9 How. Pr. 57; Kreitz v. Frost, 5 Abb. N. S. 277; Walker v. Hewitt, 11 How. Pr. 395; Leach v. Boynton, 3 Abb. Pr. 1. And the falsity must clearly appear: Hadden v. New York etc. Manuf. Co. 1 Daly, 388; Morey v. Safe Deposit Co. 7 Abb. Pr. N. S. 199.

2 People v. McCumber, 18 N. Y. 315.

3 Brown v. Jenison, 3 Sand. 732; Howell v. Ferguson, 87 N. C. 113; Foren v. Dealy, 4 Oreg. 92; Gostoris v. Taaffe, 18 Cal. 385; Beeson v. McConnaha, 12 Ind. 420.

4 Roome v. Nicholson, 8 Abb. Pr. N. S. 343; 1 Sweeny, 525.

5 Steward v. Hotchkiss, 2 Cowen, 634; Oakley v. Devoe, 12 Wend. 106; Broome County Bank v. Lewis, 18 Wend. 565.

6 See Cal. Code Civ. Proc. § 453; Oreg. Code Civ. Proc. § 74; N. Y. Code Civ. Proc. § 538; S. C. Code Civ. Proc. § 178; N. C. Code Civ. Proc. § 104.

7 Wayland v. Tysen, 45 N. Y. 281.

8 Conway v. Wharton, 13 Minn. 145; Hayward v. Grant, 13 Minn. 154; C. N. Nelson Lumber Co. v. Richardson, 31 Minn. 267; Barker v. Foster, 29 Minn. 166.

9 C. N. Nelson Lumber Co. v. Richardson, 31 Minn. 267. And see Flack v. Dawson, 69 N. C. 42; Schehan v. Malone, 71 N. C. 440.

10 Lowe v. Thompson, 86 Ind. 503.

11 Wayland v. Tysen, 45 N. Y. 281.

12 Webb v. Foster, 13 Jones & S. 311. And see Oregonian Rallw. Co. v. Oregon Rallw. etc. Co. Civ. Ct. Oreg. 4 West C. Rep. 548. A verified answer, in which the defendant avers "that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations in said complaint contained," cannot be struck out as sham: Grocers' Bank v. O'Rourke, 6 Hun, 18.

13 Shearman v. Boehm, 21 N. Y. Week. Dig. 66. And see Gaul v. Knickerbocker Life Ins. Co. 2 N. Y. Week. Dig. 238.

14 Wayland v. Tysen, 45 N. Y. 281; Deuel v. Sanford, 67 How. Pr. 354; Henderson v. Manning, 5 Civ. Proc. R. 221. A verified answer of denial should not be stricken out as sham, even after the defendant on examination before trial has admitted what the answer denies: Schultze v. Rodewald, 1 Abb. N. C. 365.

15 Fay v. Cobb, 51 Cal. 313.

16 Crompton v. Crow, 2 Utah, 245. And see § 81, *ante*.

17 Kay v. Churchill, 10 Abb. N. C. 83.

18 Roblin v. Long, 60 How. Pr. 200.

19 Winslow v. Ferguson, 1 Lans. 436; Starr v. Griswood, 1 N. Y. Week. Dig. 11; Collins v. Coghill, 7 Robt. 81.

20 Kain v. Dickel, 46 How. Pr. 208. A counter-claim is not a defense, and cannot therefore be stricken out on motion as sham: Collins v. Suan, 7 Robt. 94.

21 Henderson v. Manning, 5 Civ. Proc. R. 221; Butterfield v. Macumber, 22 How. Pr. 150; Fosdick v. Groff, 22 How. Pr. 158.

22 Clark v. Clark, 7 Robt. 276.

§ 253. **Frivolous pleading—Remedy.**—If a demurrer, answer, or reply be idle or frivolous, the remedy of the party prejudiced thereby is by a motion to strike out. And this is expressly so provided in Missouri.² But the courts will not incline to consider a pleading frivolous, and if satisfied that it was put in in good faith, and intended to raise some question of importance, they will require the other party either to reply or demur.³ The remedy provided for a frivolous pleading, in a few of the States, is a summary application to a judge in or out of court, for judgment thereon, upon previous notice to the adverse party.⁴ Under this provision a plaintiff cannot treat an answer as a nullity and enter judgment as upon a default, but must apply to the court or a judge thereof upon notice, as prescribed.⁵ And the court has no power to order judgment upon a part of an answer which may be frivolous, where a part is held good.⁶ And to support a judgment upon answer struck out as frivolous, it must appear that the answer was clearly bad, not calling for deliberation upon the issues it attempted to make.⁷ The court must see at once without argument that the answer sets up no defense.⁸ And judgment cannot be ordered for frivolousness of the answer if the complaint does not state facts constituting a cause of action.⁹ A motion for judgment on one defense in an answer as frivolous, and to strike out another as sham, may be joined in one application.¹⁰

1 See Anonymous, 7 N. J. L. 160; *Coxe v. Higbee*, 11 N. J. L. 395; *Howell v. Ferguson*, 87 N. C. 113; *Ross v. Ross*, 25 Hun, 642; *McCaulley v. Long*, 61 Tex. 74; *Foote v. Carpenter*; 7 Wis. 395; *Farmers' etc. Bank v. Sawyer*, 7 Wis. 379.

2 Mo. Code Proc. (1879) § 3523.

3 *Erwin v. Lowery*, 64 N. C. 321.

4 N. Y. Code Civ. Proc. § 537; N. C. Code Civ. Proc. § 218; S. C. Code Civ. Proc. § 270; *Roblin v. Long*, 60 How. Pr. 200; *Beal v. Union Paper Box Co.* 4 Civ. Proc. R 18.

5 *Decker v. Kitchen*, 21 Hun, 322.

6 *Strong v. Sproul*, 53 N. Y. 497; *Henderson v. Manning*, 5 Civ. Proc. R. 221; *Grocers' Bank v. O'Rourke*, 6 Hun, 18; *Munger v. Shannon*, 61 N. Y. 251; *Schmitt v. Cassilius*, 31 Minn. 7.

7 *Griffin v. Todd*, 48 How. Pr. 15; *Wyckoff v. Andrews*, 5 Civ. Proc. R. 410; 18 *Jones & S. 1st*; *Vilas Nat. Bank v. Moore*, 14 N. Y. Week. Dig. 334; *Deuel v. Sanford*, 67 How. Pr. 354.

8 *Vilas Nat. Bank v. Moore*, 14 N. Y. Week. Dig. 334.

9 *Munger v. Shannon*, 61 N. Y. 251; *Van Alstyne v. Freday*, 41 N. Y. 174.

10 *Adams v. McPartlin*, 11 Abb. N. C. 369. After a motion for judgment upon a frivolous answer, the defendant, if the time to amend has not expired, may amend as a matter of course: *Burrall v. Moore*, 9 Duer, 654; *Curtis v. Baldwin*, 4 Sand. 630. But after an answer has been stricken out as frivolous, and judgment thereon ordered against a defendant, he should not be permitted to plead another defense known to him at the time of serving such frivolous answer, and purposely withheld by him: *Stedeker v. Bernard*, 10 Daly, 466. That an answer was interposed in good faith, if frivolous, will not furnish any defense to a motion for judgment on such answer, but is held to be good reason for allowing an amendment: See *Swinburne v. Stockwell*, 58 How. Pr. 312.

§ 254. When pleadings deemed frivolous.—A frivolous answer is one which presents no defense to the action, though its contents may be true.¹ It is one which controverts no material allegation of the complaint, and the insufficiency of which is so glaring as to appear upon a bare inspection without argument.² A mere defect in form does not render an answer frivolous;³ and if it contains a single material issue it cannot be held frivolous, although it contains immaterial allegations.⁴ If a denial on information and belief is so expressed in the answer, it is not frivolous.⁵ But an answer which does not deny any of the material allegations of the complaint, nor that the defendant has knowledge or information sufficient to form a belief of either of the allegations contained in the complaint, is clearly frivolous, and should be stricken out.⁶ So an answer which merely denies each and every material allegation in the complaint contained, "in manner and form as therein set forth," is not a denial of the allegations of the complaint, and is clearly frivolous.⁷ Though a demurrer is not a defense, so as to be

stricken out as sham,⁸ judgment on it as frivolous may be moved for.⁹ But a demurrer, to be adjudged frivolous, must be not merely without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection, and indicates that its interposition was in bad faith.¹⁰ A counter-claim cannot be stricken out or disregarded as frivolous, but the remedy is by demurrer, or by a motion to make it more definite and certain.¹¹ A pleading will be held to be frivolous where there is a decision in point adverse to its sufficiency.¹²

1 *Howell v. Ferguson*, 87 N. C. 113; *Crucible Co. v. Steel Works*, 57 Barb. 447; 9 Abb. Pr. N. S. 195; *Kelly v. Barnett*, 16 How. Pr. 135; *Nichols v. Jones*, 6 How. Pr. 355.

2 *Youngs v. Kent*, 46 N. Y. 672; *Webb v. Van Zandt*, 16 Abb. Pr. 190; *Vilas Nat. Bank v. Moore*, 14 N. Y. Week. Dig. 334; *Griffin v. Todd*, 48 How. Pr. 15; *Morton v. Jackson*, 2 Minn. 219; *Cahoon v. Railroad Co.* 10 Wis. 290; *Oregonian Ry. Co. v. Oregon etc. Co. Cir. Ct. Oreg.* 22 Fed. Rep. 245.

3 *Thompson v. Griswold*, 11 N. Y. Week. Dig. 111; 11 Reporter, 62.

4 *Temple v. Murray*, 6 How. Pr. 329; *Thompson v. Erie Railway Co.* 45 N. Y. 463; *Munger v. Shannon*, 61 N. Y. 251.

5 *Metraz v. Pearsall*, 5 Abb. N. C. 90; *Stent v. Nat. Bank*, 5 Abb. N. C. 88. And see *Duncan v. Lawrence*, 3 Bosw. 103; 6 Abb. Pr. 304; *Richter v. McMurray*, 15 Abb. Pr. 346.

6 *Pratt Manuf. Co. v. Jordon Iron etc. Co.* 19 N. Y. Week. Dig. 378; 83 Hun, 143. A demurrer to a reply which amounts to a general denial of a counter-claim is frivolous: *Beggs v. Beggs*, 50 Wis. 443.

7 *Dole v. Burleigh*, 1 Dakota, 227. And see *Excelsior Sav. Bank v. Campbell*, 48 How. Pr. 347; 2 Hun, 375; 62 N. Y. 637.

8 See ‡ 252, *ante*.

9 *Kain v. Dickel*, 46 How. Pr. 208. See *Beal v. Union Paper Box Co.* 4 Civ. Proc. R. 18.

10 *Ferguson v. Troop*, 16 Wis. 571; *Cook v. Warren*, 88 N. Y. 37; *Robbins v. Palmer*, 5 N. Y. Week. Dig. 537.

11 *Cooper v. Howe*, 16 Hun, 502; *Fettrech v. McKay*, 11 Abb. Pr. N. S. 453; 47 N. Y. 426. Compare *Dodson v. Nevitt*, Sup. Ct. Mont. 6 West C. Rep. 83.

12 *Swinburne v. Stockwell*, 58 How. Pr. 312; *Collins v. Suan*, 7 Robt. 623; *People v. McCumber*, 27 Barb. 632; 15 How. Pr. 186; 18 N. Y. 315.

‡ 255. **Misnomer.**—In common-law pleading, misnomer of either party could only be pleaded in abatement of the action;¹ and the objection was waived by a

plea to the merits.² And according to some of the decisions under the Codes, the proper remedy for a misnomer is by a plea in abatement.³ But an allegation of misnomer, for the purpose of abating the action, must be full enough to wholly exclude the right of the plaintiff to sue the defendant by the name used.⁴ Generally, however, matters of misnomer may, under the Code system, be corrected by amendment.⁵ And it is well settled that the objection for misnomer is waived by answering to the merits.⁶ And a misnomer of the defendant, a corporation, is waived by an appearance and filing an answer to the merits, and cannot be raised by an objection to the admission of evidence.⁷ It was held in Ohio that where a corporation, whose name is composed of several words, is sued by a name in which a word in the corporate name is omitted, such omission or misnomer, unless pleaded in abatement, will be disregarded by the court.⁸ When sued by the wrong name, the defendant must disclose his true name in making objection to the misnomer, by plea in the nature of a plea in abatement, or otherwise.⁹ A defendant sued by a fictitious name is a party to the action from its commencement, and an amendment to the complaint by inserting the true name does not change the cause of action.¹⁰ The identity of the party is to be presumed from the identity of the name in an instrument, and averment of identity is not necessary.¹¹ The addition of "junior" to a name is mere matter of description, and forms no part of the name;¹² nor is a middle letter between the Christian and surname any part of the name, and may be rejected as surplusage in pleadings.¹³

1 *Traver v. Eighth Av. R. R. Co.*, 4 Abb. Ct. App. 422; *Trustees etc. v. Tryon*, 1 Denio, 451; 3 Keyes, 497; *Slocum v. McBride*, 17 Ohio, 607. And see *Baker v. Bessey*, 73 Me. 472; *State v. Knowlton*, 70 Me. 200; *Melvin v. Clark*, 45 Ala. 285.

2 *Bryans v. Taylor*, Wright, 245; *Hite v. Hunton*, 20 Mo. 286. So it was waived by a default: *First National Bank v. Jaggars*, 31 Md. 38.

3 See *Miller v. Stettiner*, 22 How. Pr. 518; 7 Bosw. 692; *Peden v. King*, 30 Ind. 181; *Sinton v. Steamboat etc.* 46 Ind. 478.

4 *Lyons v. Rafferty*, 30 Minn. 528.

5 See *Hite v. Hunton*, 20 Mo. 286; *Louisville etc. R. R. Co. v. Hell*, 12 Bush, 131; *Pape v. Capitol Bank*, 20 Kan. 440; *Dewey v. McLain*, 7 Kan. 128; *Jernigan v. Carter*, 60 Ga. 131. A mere misnomer is a formal error, amendable before or at the trial, or afterwards: *Barnes v. Perine*, 9 Barb. 202; 15 Barb. 243; 12 N. Y. 18; *Traver v. Railroad Co.* 6 Abb. Pr. N. S. 46; *White v. Miller*, 7 Hun, 427; *French v. Donohue*, 30 Minn. 111; and will not be regarded on appeal: *Bank v. McGee*, 20 N. Y. 355.

6 *French v. Donohue*, 30 Minn. 111; *Hite v. Hunton*, 20 Mo. 286.

7 *School District v. Griner*, 8 Kan. 224.

8 *State v. Bell Telephone Co.* 36 Ohio St. 236.

9 *Louisville etc. R. R. Co. v. Hall*, 12 Bush, 131.

10 *Farris v. Merritt*, 63 Cal. 118. And see *Baldwin v. Morgan*, 50 Cal. 535; *Campbell v. Adams*, 50 Cal. 205.

11 *Douglass v. Dakin*, 46 Cal. 43.

12 *People v. Cook*, 14 Barb. 353; 8 N. Y. 67; *Allen v. State*, 52 Ind. 486; *Johnson v. Ellison*, 4 Mon. B. 526; *Coit v. Starkweather*, 8 Conn. 293; *Prentiss v. Blake*, 34 Vt. 460.

13 *Mulk v. Christie*, 1 Hill, 102; *Phillips v. Evans*, 64 Mo. 17; *Choen v. State*, 52 Ind. 347; *Mead v. State*, 26 Ohio St. 505.

2 256. **Striking pleading from files—Generally.**—The practice of making a motion to strike from the files subserve the purposes of a general demurrer is not approved by the courts.¹ And where objections to a pleading are based, not on any irregularity connected with its filing, nor to any matter pertaining to its form merely, but on its alleged insufficiency in matter of substance, the objection ought to be taken by demurrer and not by motion to strike from the files.² The provision for a demurrer to a pleading for insufficiency supersedes the practice of moving to strike from the files.³ And the sufficiency of a defense cannot be tried on a motion to strike out.⁴ The failure to sign and verify a complaint or petition is no ground for dismissing an action, and when these defects exist, a motion may be properly interposed to strike the pleading from the files, which will compel the filing of a new complaint properly verified.⁵ An answer so substantially defective as to create no issue in the case, may properly

be stricken out on motion.⁶ And pleas which present no matter of defense which could not be given in evidence under the general issue already pleaded may be stricken out.⁷ So, if a defendant is given leave to put in an amended answer, on condition that no matter be set up therein which will affect orders previously made in the cause, such amended answer will be stricken out if it is incompatible with the terms upon which the leave was granted.⁸ The defendant's motion to strike out the plaintiff's demand for a bill of particulars was held to be properly granted, in a case where the defendant's moving affidavit furnished full particulars of the only matter not admitted by the plaintiff.⁹ An answer or other pleading will not in general be struck from the files, provided such pleading is in decent and decorous language.¹⁰ And overruling a motion to strike out portions of a pleading is no ground for reversal even if erroneous, where the motion did not strike at any vital part of the pleading, and sustaining the motion could not have benefited the appellant.¹¹ So, after matter is stricken from a pleading, and all evidence admissible under the original pleading can still be introduced, the error, if any, in striking out such matter, is immaterial, and the order will be affirmed.¹² If a motion to strike certain matter out of a pleading is sustained, it is the right of the adverse party to have such matter erased or an amended pleading filed, but if this is not insisted upon, it will be sufficient to treat the objectionable matter as stricken out.¹³ A pleading struck out in the court below will constitute no part of the record of the cause on appeal, unless it is made so by bill of exceptions or by an order of court.¹⁴ But on an application for judgment upon a pleading as frivolous,¹⁵ the frivolous pleading in such cases is not stricken out, but remains upon the record, and becomes a part of the judgment roll.¹⁶

- 1 Robinson v. Fitch, 26 Ohio St. 662. And see Wilson v. Marks, 13 Fla. 322.
- 2 Finch v. Finch, 10 Ohio St. 501. And see § 41, *ante*.
- 3 State v. Harper, 6 Ohio St. 607, 611. And see Gause v. Knapp, 1 McCrary, 75.
- 4 Walter v. Fowler, 85 N. Y. 621; McCammack v. McCammack, 88 Ind. 387.
- 5 Fritz v. Barnes, 6 Neb. 435. And see Conn v. Rhodes, 26 Ohio St. 644. Illegibility of a pleading is ground for a motion to strike from the files: Downer v. Staines, 4 Wis. 372; 5 Wis. 158.
- 6 Pratt Manuf. Co. v. Jordon etc. Co. 33 Hun, 143; Oregonian Ry. Co. v. Oregon Ry. etc. Co. Cir. Ct. Oreg. 22 Fed. Rep. 245.
- 7 Wheelock v. McGee, 1 New Mexico, 573; De Forrest v. Butler, 62 Iowa, 78.
- 8 Crump v. Thomas, 89 N. C. 241.
- 9 Perzel v. Shook, 13 Jones & S. 206.
- 10 Heath v. White, 3 Utah, 474. But where a pleading in its denial states that every allegation of the opposite party is "corruptly false," it should be removed from the files until reformed: Mitchell v. Brown, 88 N. C. 156.
- 11 Holt v. Brown, 63 Iowa, 319.
- 12 Sloteman v. Mack, 61 Iowa, 575. And see De Forrest v. Butler, 62 Iowa, 78; Wheelock v. McGee, 1 New Mexico, 573.
- 13 King v. Bell, 13 Neb. 409.
- 14 Peck v. Board etc. 87 Ind. 221; Dunn v. Tousey, 80 Ind. 288; Scotten v. Randolph, 96 Ind. 581.
- 15 See § 253, *ante*.
- 16 Briggs v. Bergen. 23 N. Y. 162; Strong v. Sproul, 53 N. Y. 497.

§ 257. **Lost pleadings.**—Pleadings are essential to form an issue, and without an issue it is error for the court to order a cause on to trial.¹ Nor can pleadings be dispensed with by agreement,² except in those cases provided for the submission of an agreed case without action.³ But where the parties proceeded to trial without pleadings, no objection being taken, and there was a verdict and judgment, such irregularity was held not to be sufficient ground for reversal of the judgment on error.⁴ If an original pleading be lost, or withheld by any person, the court may authorize a copy to be filed and used instead of the original.⁵ The place of the lost pleading can only be supplied by motion based upon affidavits showing what it contained, and by the service

of personal notice upon the opposite party of the intention to move, which notice must be sufficiently explicit to advise him of what is intended, as well as to enable him to controvert the affidavits submitted.⁶ And a lost pleading cannot be substituted by mere amendment, without affidavits or certificates as to the lost paper.⁷ Where a substitute for a lost pleading is allowed to be filed, and the original is afterwards found, it is error to overrule a motion to strike the substituted pleading from the files;⁸ conceding the two pleadings to be exactly alike, there is no reason why the record should be encumbered with both papers.⁹

1 *Mason v. Embree*, 5 Ohio, 277; *Wilkinson v. Daniel, Wright*, 268.

2 *McBride v. Moore, Wright*, 524; *Hicks v. Marshall*, 67 Ga. 713.

3 See *Dickenson v. Dickey*, 76 N. Y. 602; *Wood v. Squires*, 60 N. Y. 191; *McKethan v. Roy*, 71 N. C. 165, *Newark etc. R. R. Co. v. Commissioners*, 30 Ohio St. 120.

4 *Hallem v. Jacks*, 11 Ohio St. 692.

5 See N. Y. Code Civ. Proc. § 726; Cal. Code Civ. Proc. § 1045; Kan. Code Civ. Proc. § 132; Ohio Rev. Stats. § 5084; *Davis v. Wilson*, 11 Kan. 74; *Renoult v. Harris*, 2 Sand. 642.

6 *People v. Cazalis*, 27 Cal. 522; *McLeadon v. Jones*, 8 Ala. 298. Compare *Benedict v. Cozzens*, 4 Cal. 381.

7 *Newman v. Dodson*, 61 Tex. 91.

8 *Sweet v. Brown*, 61 Iowa, 669.

9 *Sweet v. Brown*, 61 Iowa, 669.

CHAPTER XII.

WAIVER OF OBJECTIONS.

- § 258. In general.
- § 259. To jurisdiction of court.
- § 260. To filing of complaint.
- § 261. To want of subscription or verification.
- § 262. Want of capacity to sue.
- § 263. Defect of parties.
- § 264. Misjoinder of parties.
- § 265. Misjoinder of actions.
- § 266. Causes of action not separately stated and numbered.
- § 267. Another action pending.
- § 268. Omitting name.
- § 269. Uncertainty and indefiniteness.
- § 270. By pleading over.
- § 271. In particular cases.

§ 258. In general.—A verdict will many times aid a defective pleading,¹ and pleadings which would be bad on demurrer are often held good after verdict.² And it is held that not only mere defects of form, but faults affecting substantive facts, are often aided by a verdict.³ The rule is, that every reasonable intendment is to be made in favor of the pleadings and in aid of the verdict.⁴ And parties may waive their objections to pleadings or lose all benefits therefrom, by not making them in the proper mode, or at the proper time.⁵ Thus, objection to new matter in a reply constituting it a departure is too late after verdict.⁶ So, objection to a complaint that it contained no reference to the account thereto annexed is cured by verdict.⁷ A complaint upon a promissory note was held good after verdict, although neither the note nor the indorsement to the plaintiff was set out.⁸ So, where the complaint was for the recovery of money paid by the plaintiff for the defendant, it was held that the failure to allege a request was supplied by the ver-

dict.⁹ A misnomer in the plaintiff's name in the complaint and summons is cured by a verdict, and judgment rendered in the plaintiff's favor by his proper name.¹⁰ And if the answer alleges a fact necessary to the validity of a complaint, but omitted therefrom, the latter is sufficient after verdict.¹¹ Generally speaking, a defendant by pleading to the merits waives objection to formal defects.¹² But objections cannot be so waived as to deprive the court of the power, or release it from the duty of considering them.¹³

1 See § 235, *ante*; *Eshelman v. Snyder*, 82 Ind. 498; *Houghton v. Beck*, 9 Oreg. 325; *Smith v. Townsend*, 21 W. Va. 486; *Quick v. Miller*, 103 Pa. St. 67; *Edwards v. Railroad Co.* 74 Mo. 117.

2 *Parker v. Clayton*, 72 Ind. 307; *Lewis v. Bortsfeld*, 75 Ind. 390; *Roberts v. Porter*, 78 Ind. 130; *Donellan v. Hardy*, 57 Ind. 393.

3 *Parker v. Clayton*, 72 Ind. 307. And see *Bliss v. Arnold*, 8 Vt. 252; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Bailey v. Clay*, 4 Rand. 346.

4 *Addington v. Allen*, 11 Wend. 374; *Morey v. Homan*, 10 Vt. 585; *Owen v. Schmidt*, 14 Phila. 184; *Parker v. Clayton*, 72 Ind. 307.

5 *Lassiter v. Jackman*, 88 Ind. 120. Where a corporation in its complaint made no averment of its corporate existence, and no objection was made by answer or otherwise until after judgment, the defect was waived: *Spence v. Ins. Co.* 40 Ohio St. 517.

6 *Beard v. Hand*, 88 Ind. 183.

7 *Lassiter v. Jackman*, 88 Ind. 120.

8 *Westfall v. Stark*, 24 Ind. 377; *Purdue v. Stevenson*, 54 Ind. 161.

9 *Wilson v. Kelly*, 58 Ind. 586.

10 *Kronski v. Mo. Pac. Railw. Co.* 77 Mo. 362. See *Waldrop v. Leonard*, Sup. Ct. S. C. 19 Reporter, 797; 22 S. C. 303.

11 *Turner v. Corbett*, 9 Oreg. 73; *Warner v. Lockerby*, 28 Minn. 23; *Rollins v. St. Paul Lumber Co.* 21 Minn. 5.

12 *Grove v. City of Kansas*, 75 Mo. 672. And see *Sappington v. Railway Co.* 14 Mo. App. 86.

13 *Bennett v. American Art Union*, 5 Sand. 631.

§ 259. To jurisdiction of court. — Where a defendant makes an unqualified general appearance in an action, he cannot afterwards object to the jurisdiction of the court over the person.¹ The rule of law is, that where a party voluntarily appears to the merits of any controversy, he thereby waives all irregularities which may have intervened in getting him into court.² But a de-

fendant, by demurring solely on the ground that the court has no jurisdiction of the person, and by putting in a qualified appearance for that purpose alone, does not confer jurisdiction.³ And a voluntary appearance does not waive the defendant's time to plead, but only informality of process and service.⁴ But where the defendant, by his demurrer to the jurisdiction, raises questions non-jurisdictional and involving the merits, he thereby submits himself and his rights to the jurisdiction of the court, and can no longer be heard to say that it had no jurisdiction.⁵ Objection that the court has not jurisdiction of the subject of the action is not, however, waived by pleading over.⁶ Submitting to answer after judgment on the demurrer is not a waiver of the objection.⁷

1 *Palmer v. Phoenix Life Ins. Co.* 10 N. Y. Week. Dig. 179; 84 N. Y. 63; *Olcott v. Maclean*, 73 N. Y. 223. Although parties to an action may waive objection to the venue, they cannot, by consent, give jurisdiction to a court over the subject-matter: *Leach v. Railroad Co.* 65 N. C. 486.

2 *Bury v. Conklin*, 23 Kan. 400; *Carver v. Shelly*, 17 Kan. 472; *Sprague v. Irwin*, 27 How. Pr. 51; *Hoag v. Lamont*, 16 Abb. Pr. N. S. 91. And see *Burling v. Freeman*, 2 Hun, 461.

3 *Allen v. Malcolm*, 12 Abb. Pr. N. S. 335; *Sullivan v. Frazer*, 4 Robt. 616; *Ogdensburgh etc. R. R. Co. v. Vt. etc. R. R. Co.* 4 Hun, 712; 63 N. Y. 176; 16 Abb. Pr. N. S. 249.

4 *Harker v. Fahie*, 2 Oreg. 83.

5 *Meixell v. Kirkpatrick*, 29 Kan. 679; *Burdette v. Corgan*, 26 Kan. 102. Although the court has no jurisdiction of an action brought against a foreign corporation by a non-resident, to recover damages for a personal injury committed out of the State, yet the want of jurisdiction relating to the person, and not to the subject-matter, is waived by answering to the merits: *Pease v. Delaware etc. R. R. Co.* 10 Daly, 459. See *Gibbs v. Queen Ins. Co.* 63 N. Y. 114; *McCormick v. R. R. Co.* 49 N. Y. 303; *Harriott v. Railroad Co.* 2 Hilt. 262; *Handy v. Etina Ins. Co.* 37 Ohio St. 366.

6 *People v. Central R. R. Co.* 42 N. Y. 233. See *Gray v. Ryle*, 18 Jones & S. 198; 5 Civ. Proc. R. 387.

7 *People v. Central R. R. Co.* 42 N. Y. 233.

‡ 260. To filing of complaint. — Although a complaint in an action under the Code ought regularly to be in writing, and filed at the commencement of the pleading,¹ yet it is held that the complaint may be waived,

and judgment be confessed or entered by consent.² It is held that a judgment is not void because no complaint has been filed.³ And especially is this so where the defendant has waived the objection to the omission to file a complaint in writing, by answering the oral complaint of the plaintiff, by leave of the court.⁴

1 See §§ 25, 256, *ante*.

2 *Leach v. Railroad Co.* 65 N. C. 486. And see *Graham v. Railroad Co.* 64 N. C. 631.

3 *Leach v. Railroad Co.* 65 N. C. 486.

4 *Little v. McCarter*, 89 N. C. 233.

§ 261. **To want of subscription or verification.**—Neither the subscription nor verification constitute any part of a pleading, and their omission can only be deemed an irregularity, which would justify the court in striking it out, on motion.¹ It is a mere irregularity which is waived by pleading over or demurring.² A party upon application in a proper case may be allowed to amend by adding a verification.³ And if a party seeks to take advantage of defects in the verification of his adversary's pleading, he must act at once, or his delay will be construed as a waiver of such defects.⁴ The objection is not a proper one to be raised on the trial.⁵ And it is too late to object to want of verification for the first time in the court of review.⁶ But where the plaintiff filed his complaint properly verified, and the defendant filed his answer thereto without verification, it was held that the plaintiff should have had judgment, as for want of an answer.⁷ And where service of an answer to a verified complaint, consisting of a general denial only, was admitted by the plaintiff's attorney, and "verification thereof waived," it was held that the waiver of verification did not admit the sufficiency of the answer, or dispense with the necessity of a specific denial.⁸

1 *State v. Chadwick*, 10 Oreg. 423; *Fritz v. Barnes*, 6 Neb. 435; *Warner v. Warner*, 11 Kan. 121; *Pudney v. Burkhart*, 62 Ind. 179; *Ehle v. Huller*, 6 Bosw. 661; 10 Abb. Pr. 237.

2 *State v. Bath*, 21 Kan. 583; *State v. Chadwick*, 10 Oreg. 423; *Hughes v. Feeter*, 18 Iowa, 142. The right to require the plaintiff to verify his complaint or petition is waived by answer, and after having thus waived his right, the defendant cannot regain it by withdrawing his answer: *Butler v. Church of Immaculate Conception*, 14 Bush, 540.

3 *Bragg v. Bickford*, 4 How. Pr. 21; *Davis v. Potter*, 4 How. Pr. 155; *Jones v. United States Slate Co.* 16 How. Pr. 123; *White v. Freese*, 2 Cin. Rep. 30.

4 *White v. Cummings*, 3 Sand. 716; *Hull v. Ball*, 14 How. Pr. 305. If a copy of a pleading which should be verified has a defective verification, or the verification is omitted, and the copy is retained by the party upon whom the service is made, it is a waiver of the defect or omission: *Hayward v. Grant*, 13 Minn. 165; *Wilkin v. Gilman*, 13 How. Pr. 225. And see *Wilson v. Bennett*, 2 Civ. Proc. R. 34; *Ralph v. Husson*, 19 Jones & S. 515.

5 *Swarz v. Oppold*, 74 N. Y. 307; *Butler v. Church of Immaculate Conception*, 14 Bush, 540.

6 *Payne v. Flournoy*, 23 Ark. 500.

7 *Alspaugh v. Winstead*, 79 N. C. 526.

8 *Harney v. Porter*, 62 Cal. 511. When a judgment is rendered on a warrant of attorney which authorizes the waiving of process and the release of all errors, any defect in the verification of the petition, on a proceeding in error, will be deemed to have been waived: *First Nat. Bank v. Reed*, 31 Ohio St. 435.

§ 262. **Want of capacity to sue.**—An objection to the capacity of a plaintiff to maintain an action, if not taken by demurrer or answer, is waived.¹ Thus, where an infant sues without procuring the appointment of a guardian or next friend, as required by the statute, the defendant may take advantage of the defect by demurrer or by answer, but if he fails to do so, the defect is waived.² The defendant cannot, on the trial, after the evidence is closed, for the first time object to a recovery on the ground that the plaintiff was not the real party in interest, and had no capacity or right to sue.³ And where the plaintiff was trustee of an express trust, and brought an action in his own name without alleging in his complaint that he was such trustee, it was held that the objection was not available on appeal, not having been raised on the trial.⁴ The objection

that the plaintiffs, upon the showing made in the complaint or petition, are not in law entitled to sue as a firm, should be taken by demurrer, and if not so taken, the objection is waived.⁵

1 *Town of Pierrepont v. Lovell*, 4 Hun, 696; *Mosselman v. Caen*, 21 How. Pr. 243; 34 Barb. 66; *Hoop v. Plummer*, 14 Ohio St. 448; *People v. Metrop. Telephone Co.* 31 Hun, 536.

2 *Jones v. Steele*, 36 Mo. 324; *Rutter v. Puckhofer*, 9 Bosw. 638; *Parks v. Parks*, 13 Abb. Pr. 161. And see *Palmer v. Davis*, 23 N. Y. 242. So the objection that the plaintiff is an alien enemy, if not taken by demurrer or answer, is waived: *McNair v. Toler*, 21 Minn. 175.

3 *Perkins v. Ingersoll*, 1 Dill. 417.

4 *Davis v. Reynolds*, 48 How. Pr. 210.

5 *Haskins v. Alcott*, 13 Ohio St. 210, 217.

§ 263. **Defect of parties.**—The objection that there is a defect of parties must be taken by answer or demurrer, otherwise the objection is deemed to be waived.¹ And no distinction is made in this respect between actions *ex contractu* and actions *ex delicto*, or between a defect of parties plaintiff and of parties defendant.² Where a member of a partnership is not joined as plaintiff in an action on a demand due the firm, if objection is not taken to this defect by answer, it cannot be raised on the trial, upon a motion for a nonsuit, on the ground of a variance or failure of proof, as might have been done at common law.³ And if the objection be taken by answer, it must distinctly set up the defect of parties as a defense, and must allege wherein the defect consists, specifically stating who should have been joined as plaintiff.⁴ The objection of defect of parties cannot be raised by instructions to the jury;⁵ nor can the objection be raised in the court above.⁶ If a defect of parties defendant is apparent upon the face of the complaint, and advantage of the defect be not taken by demurrer, it will be deemed waived if the defendants answer, even though they insist on the defect in their answer.⁷

1 *Merritt v. Walsh*, 32 N. Y. 685; *Davis v. Bechstein*, 69 N. Y. 440; 25 Am. Rep. 218; *Darling v. Kirk*, 4 N. Y. Week. Dig. 67; *Risley v. Wightman*, 13 Hun. 163; *Browning v. Marvin*, 22 Hun. 547; *Horst Kotte v. Menier*, 50 Mo. 160; *Butler v. Lawson*, 72 Mo. 247; *Blackeley v. Le Duc*, 22 Minn. 476; *Lowry v. Harris*, 12 Minn. 255; *Waits v. McClure*, 10 Bush. 763; *Roberts v. Johnson*, 5 Jones & S. 157; 58 N. Y. 613; *Blount v. Wetherell*, 32 Hun. 386.

2 *Davis v. Choteau*, 32 Minn. 548; *Tremper v. Conklin*, 44 Barb. 456; *Conklin v. Barton*, 43 Barb. 435.

3 *Davis v. Choteau*, 32 Minn. 548. And see *Albro v. Lawson*, 17 Mon. B. 642; *Wotherspoon v. Wotherspoon*, 17 Jones & S. 152.

4 *Davis v. Choteau*, 32 Minn. 548.

5 *Dunn v. Railroad Co.* 68 Mo. 268.

6 *Potter v. Ellice*, 48 N. Y. 221.

7 *Walker v. Deaver*, 79 Mo. 664.

2 234. **Misjoinder of parties.**—If it is sought to take advantage of the misjoinder of parties plaintiff, the objection should be raised in the court below;¹ and the defendant having failed to raise it there, must be considered as having waived it, and cannot be admitted to raise it for the first time in the reviewing court.² So an objection to the erroneous admission of a new party to an action comes too late, if made for the first time when the case has reached the court above.³ Misjoinder of parties in a complaint has generally been made a ground of demurrer in the several Codes;⁴ and if upon the face of a complaint there appears to be a misjoinder of parties plaintiff, the objection must be taken by special demurrer, and if not so taken, it is waived.⁵ The question cannot be raised under a demurrer interposed upon the ground that the complaint does not state facts to constitute a cause of action.⁶ A misjoinder of parties plaintiff not appearing upon the face of the complaint, may be pleaded in the answer, and be made a ground of nonsuit against all the plaintiffs.⁷ The objection that one interested with the plaintiff is made a defendant, and no reason given for not making him a plaintiff, is held to be waived by a failure to demur.⁸

- 1 Long v. De Bevis, 31 Ark. 480.
- 2 Long v. De Bevis, 31 Ark. 480.
- 3 Well v. Simmons, 66 Mo. 617.
- 4 See § 50, *ante*.
- 5 Tennant v. Pfister, 51 Cal. 511.
- 6 Tennant v. Pfister, 51 Cal. 511; Gillam v. Sigman, 23 Cal. 637. See Marsh v. Board of Supervisors, 33 Wis. 250; Willard v. Reas, 26 Wis. 540; Schiffer v. Eau Claire, 51 Wis. 385; Nevil v. Clifford, 55 Wis. 161.
- 7 South Fork etc. Canal Co. v. Snow, 49 Cal. 155.
- 8 Williams v. Ingersoll, 23 Hun, 284.

§ 265. **Misjoinder of actions.** — Objection to a complaint for misjoinder of distinct causes of action, if not taken by demurrer or answer, is waived.¹ And according to the decisions in some of the States, the objection is waived unless taken by demurrer.² And it is held that the misjoinder cannot be taken advantage of, unless specially assigned by the demurrer.³ In Arkansas, objection is taken by motion to strike out.⁴ In Dakota, it should be taken by demurrer, motion to strike out, or motion to compel the plaintiff to elect upon which cause of action he will proceed.⁵ If taken in none of these modes, the objection is waived.⁶ It was however held, that where a complaint contains a variety of subjects of litigation not proper to be joined, also parties not properly joinable, and omitting necessary parties, the court may *sua sponte* dismiss the complaint for multifariousness, whether demurred to for such causes or not.⁷

1 James v. Wilder, 25 Minn. 305; Cloon v. Insurance Co. 1 Handy, 32.

2 Blossom v. Barrett, 37 N. Y. 434; Field v. Hurst, 9 S. C. 277; Finley v. Hayes, 81 N. C. 368; Simpson v. Greeley, 8 Kan. 586; Jessup v. City Bank, 14 Wis. 331; Cary v. Wheeler, 14 Wis. 281. And see Goldberg v. Ultey, 60 N. Y. 427.

3 Haverstock v. Trudel, 51 Cal. 431.

4 Terry v. Rosell, 32 Ark. 478; Dyer v. Jacoway, 42 Ark. 186.

5 Fraley v. Bentley, 1 Dakota, 25.

6 Fraley v. Bentley, 1 Dakota, 25. And see McCarthy v. Garaghty, 10 Ohio St. 438; Berry v. Carter, 19 Kan. 135; Turner v. Althaus, 6 Neb. 54.

7 Mattair v. Payne, 15 Fla. 682.

§ 266. **Causes of action not separately stated and numbered.**—When a complaint or petition contains more than one cause of action, each is required to be stated in a count or division by itself, and numbered;¹ but when this rule is violated, the defendant must make his objection in the court below, and if he fails to do so, and goes to trial, he thereby waives the objection.² The objection is properly made by motion,³ and a demurrer will not lie to a complaint containing different causes of action which may be united, merely because they are not separately stated and numbered.⁴ But the court may, of its own motion, require the plaintiff to state separately his several causes of action.⁵ And it is held to be within the discretion of the court below to compel an election between the causes of action stated in one count, or require them to be separately stated and numbered.⁶

1 See § 35, *ante*.

2 Cobbe v. Railroad Co. 33 Iowa, 601; Cruver v. Railroad Co. 62 Iowa, 460; Truitt v. Baird, 12 Kan. 420; McKinney v. McKinney, 8 Ohio St. 423; Christal v. Craig, 50 Mo. 367.

3 Sentinel Co. v. Thomson, 38 Wis. 489; Adams v. Secor, 6 Kan. 542; Ridenour v. Mayo, 29 Ohio St. 138.

4 Goldberg v. Ulter, 60 N. Y. 427; Anderson v. Hill, 53 Barb. 238; Tisdale v. Moore, 8 Hun, 19; Freer v. Denton, 61 N. Y. 492.

5 Bailey v. Hughes, 35 Ohio St. 601.

6 People v. Tweed, 63 N. Y. 194.

§ 267. **Another action pending.**—The proper method of taking advantage of the pendency of a previous action for the same cause is by demurrer or answer, and if the objection is not so taken, it is waived.¹

1 Hornfager v. Hornfager, 6 How. Pr. 279; Bishop v. Bishop, 7 Robt. 194; Dawley v. Brown, 9 Hun, 461. And see Williams v. McGrade, 18 Minn. 88.

§ 268. **Omitting name.**—It is bad practice to sue by initial letters instead of the full name.¹ But the objection for uncertainty in the name in such case is held

to be waived by answering to the merits.¹ Where the name of one of several defendants did not appear in the complaint when filed, or in the writ when issued, but was added before service, and he did not appear, and judgment was entered against him by default, the objection was held to be waived.²

1 *Gardner v. McClure*, 6 Minn. 250. The omission of the Christian names of the parties in pleadings renders them defective for uncertainty: *Wiebold v. Herman*, 2 Mont. 603.

2 *Nichols v. Dobbins*, 2 Mont. 540. And see *School District v. Griner*, 8 Kan. 224; *Nelson v. Highland*, 13 Cal. 74.

3 *Belkin v. Rhodes*, 76 Mo. 643.

§ 269. **Uncertainty and indefiniteness.**—When the allegations of a pleading are so indefinite and uncertain that the precise nature of the claim or defense is not apparent, the objection to the pleading must be by motion to make more definite.¹ And the rule is, that where a party fails to avail himself of a motion to make a pleading more definite and certain, he will be considered as waiving the objection to the pleading on that ground.² So, objection to a pleading for inconsistency is waived, unless taken advantage of by motion;³ or by demurrer under the California Code.⁴

1 *Posey v. Green*, 78 Ky. 162; *Pugh v. White*, 78 Ky. 210; *Mills v. Rice*, 3 Neb. 76; *Farrar v. Triplett*, 7 Neb. 237. And see § 246, *ante*. A motion to make more definite and certain averments which in themselves may be treated as surplusage is properly denied: *Davidson v. Seligman*, 19 Jones & S. 47.

2 *Kimball v. Darling*, 32 Wis. 675; *Quintard v. Newton*, 5 Robt. 72; *Madden v. Railway Co.* 30 Minn. 453; *Brooks v. Hanchett*, 21 N. Y. Week. Dig. 287.

3 See *Hewitt v. Brown*, 21 Minn. 163; *Dean v. Leonard*, 9 Minn. 190; *Am. Dock Co. v. Staley*, 8 Jones & S. 539; *Pavey v. Pavey*, 30 Ohio St. 600; *Trimble v. Doty*, 16 Ohio St. 129; § 17, *ante*.

4 *Jamison v. King*, 50 Cal. 132.

§ 270. **By pleading over.**—If a party who has filed a demurrer to a pleading pleads thereto before his demurrer has been ruled upon, he thereby waives his demurrer, if the defect demurred to is one which can

be waived.¹ As where the defendant answers prior to, and without a decision upon a demurrer previously filed by him to the complaint, he thereby waives his demurrer.² Thus, where a complaint or petition which contains a good cause of action, except that it appears to be barred by the Statute of Limitations, is demurred to, and the defendant afterward, pending the demurrer, answers to the merits, and an issue of fact is joined thereon and trial had, the demurrer must be taken to have been waived.³ So, if a good defense is defectively stated in an answer, and a demurrer thereto on that ground is overruled, the party demurring, in order to avail himself of his exception taken to the ruling of the court thereon, must rest on his demurrer, and if he reply he thereby waives his exception;⁴ but this rule does not apply where the facts stated in the answer of themselves constitute no defense.⁵ By answering over after demurrer overruled, the demurrer is waived, and error cannot be assigned on overruling the demurrer.⁶ So, if a party amends his pleading on a judgment sustaining a demurrer thereto, he waives his right to call in question the action of the court in sustaining the demurrer.⁷ And generally, the effect of filing an amendment to a pleading after a demurrer has been interposed thereto is to submit to the demurrer.⁸ And where a defendant answers, setting up the same defense relied upon on demurrer, the demurrer having been overruled, the answer is held to be a waiver of the demurrer.⁹ But pleading over, after a demurrer overruled, is not a waiver of the objection that the court has not jurisdiction of the subject of the action;¹⁰ nor of the objection that the pleading does not state facts constituting a cause of action or defense.¹¹ The right to object to an erroneous ruling on a motion to strike a pleading from the files,¹² or to strike out redun-

dant and irrelevant matter,¹³ or to dismiss,¹⁴ or to make more definite and certain, is waived by pleading over.¹⁵ And the want of a proper subscription or verification is a mere irregularity, which is waived by pleading over.¹⁶

1 Gordon v. Culbertson, 51 Ind. 334; Morrison v. Fishel, 64 Ind. 177. And see § 231, *ante*.

2 Moss v. Witness Printing Co. 64 Ind. 125; Calvin v. State, 12 Ohio St. 60.

3 Vose v. Woodford, 29 Ohio St. 245.

4 Farrar v. Triplett, 7 Neb. 237.

5 Farrar v. Triplett, 7 Neb. 237.

6 Freas v. Englebrecht, 3 Colo. 377; Stanbury v. Kerr, 6 Colo. 28; Richards v. Fanning, 5 Oreg. 356; Union Ins. Co. v. McGookey, 33 Ohio St. 555. And see § 57, *ante*.

7 Hurd v. Smith, 5 Colo. 233; Perkins v. Davis, 2 Mont. 474.

8 District Township v. District Township, 44 Iowa, 512.

9 Meyer v. Binkleman, 5 Colo. 262.

10 People v. Railroad Co. 42 N. Y. 283.

11 Richards v. Fanning, 5 Oreg. 356; O'Donohue v. Hendrix, 13 Neb. 255; Bartges v. O'Neil, 13 Ohio St. 72.

12 Shuggart v. Pattee, 37 Iowa, 422; Baldwin v. Daugherty, 39 Iowa, 50; Harrell v. Tenant, 30 Ark. 684.

13 Savage v. Challiss, 4 Kan. 319.

14 Rea v. Flathers, 31 Iowa, 545.

15 Prindle v. Caruthers, 15 N. Y. 525.

16 State v. Chadwick, 10 Oreg. 423. And see § 34, *ante*.

§ 271. In particular cases.—It is said to be a rule of pleading, without an exception, that an answer to the merits waives all defects of a formal or technical character in a complaint or petition which states a cause of action.¹ So, an objection that may be raised by answer in the nature of a plea in abatement is waived by not being so raised.² Thus, objection that an action was brought upon a guaranty of a mortgage without leave of the court, after an action to foreclose the mortgage, may be raised by answer in the nature of a plea in abatement, and not being so raised is waived.³ An objection to a complaint that it contained no reference to a bill of particulars thereto annexed is waived by

the defendant's failure to demur to the complaint.⁴ Upon leave being denied to file an amended answer, the defendant filed a second answer, omitting the matter objected to in the first, and it was held that although it was error to reject the first answer, the defendant waived his right to object by filing the second.⁵ Objection to the form of an answer in not containing any prayer for the particular relief demanded by the defendant, even if that be a defect, is one which should be presented by a demurrer, and is waived by going to trial upon an issue of fact.⁶ An objection to the form of an answer, as that a denial is insufficient to raise an issue, must be taken before the trial.⁷ And after going to trial on the issue, it is too late for the plaintiff to object that a defense set up in the answer arose after suit brought.⁸ So, the objection that a counter-claim was not set up in the answer with sufficient distinctness cannot be raised for the first time on appeal, when evidence on the subject was given without objection at the trial.⁹ But objection to a counter-claim, that it is not, in law, available as such, is not waived or cured by a reply thereto.¹⁰ When a defendant treats an original and an amended complaint as one, by answering the allegations contained in both, he thereby waives the objection that the original is superseded by the amended pleading.¹¹ An objection that the promise sued upon is joint, and that the plaintiff should have joined the other covenantees as parties, is waived by putting in an answer containing only a general denial.¹²

1 *School District v. McIntie*, 14 Neb. 46, 50; *Waters v. Reuber*, 16 Neb. 101; *Sappington v. Railway Co.* 14 Mo. App. 86. Objection of want of jurisdiction is not waived by an answer to the merits: *Gray v. Ryle*, 18 Jones & S. 198.

2 *Krower v. Reynolds*, 19 N. Y. Week. Dig. 383; *Williams v. McGrade*, 18 Minn. 83.

3 *Krower v. Reynolds*, 19 N. Y. Week. Dig. 383; *McKernan v. Robinson*, 84 N. Y. 105.

- 4 *Lassiter v. Jackman*, 88 Ind. 118.
- 5 *Bowles v. Doble*, 11 Oreg. 474.
- 6 *Dawson v. Brown*, 9 Hun, 461. See *Riley v. Sexton*, 32 Hun, 250; *Edwards v. Woodruff*, 90 N. Y. 400.
- 7 *McGuinness v. Mayor etc.* 13 N. Y. Week. Dig. 522; 26 Hun, 142.
- 8 *Reimer v. Doerge*, 61 How. Pr. 142.
- 9 *Glen & Hall Manuf. Co. v. Hall*, 61 N. Y. 226, 237; 19 Am. Rep. 278.
- 10 *Smith v. Hall*, 67 N. Y. 48; *People v. Dennison*, 84 N. Y. 272; 8 Abb. N. C. 129.
- 11 *Kline v. Corey*, 18 Hun, 524.
- 12 *Warner v. Ross*, 9 Abb. N. C. 385.

CHAPTER XIII.

CONSTRUCTION OF PLEADINGS.

- § 272. In general.
- § 273. Presumptions.
- § 274. Ambiguity.
- § 275. Instances of construction unfavorable to pleader.
- § 276. General rules.
- § 277. Words and phrases.
- § 278. Abbreviations.
- § 279. Allegations as to time.
- § 280. Of admissions.

§ 272. In general.—By the settled rule of the common law, a pleading is to be construed most strongly against the party pleading,¹ the rule being based upon the presumption that the pleader states his case as favorably for his side of the controversy as the facts will justify.² But the Code system of pleading has entirely abrogated this common-law rule as to the construction of pleadings,³ or, at least, has so far modified the rule as now to require pleadings to be liberally construed, with a view to substantial justice between the parties.⁴ In accordance with the latter rule of construction, a complaint is sufficient which contains, in ordinary and concise language, allegations of such constitutive facts as will entitle the plaintiff to prove and maintain his case, and give the defendant opportunity to meet and controvert the alleged facts relied upon by the plaintiff.⁵ If the allegations of the pleading be so indefinite or uncertain that the precise nature of the charge is not apparent, the remedy of the opposite party is an application to the court to require the pleading to be made definite and certain.⁶ No motion being made to compel the pleading to be made more definite and certain, it will be held sufficient if the

necessary allegations are implied or imported in the facts alleged.¹ But notwithstanding the liberal rule of construction now applied to pleadings, the principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*.² The Code system does not rescind the rule that the allegation and the proof must correspond, nor the correlative principle, that the judgment must follow the pleadings.³ And the rule of liberal construction as applied to pleadings is held to extend only to matters of form, and does not apply to the fundamental requisites of a cause of action.⁴ A pleading must be considered with reference to the general theory on which it proceeds, and if not good in that respect, it will not be good at all.⁵ Thus, a complaint for the recovery of a penalty must be good for that purpose, and not for some other, since to rule otherwise would put it in a plaintiff's power to make an elastic pleading, changeable to meet the exigencies of his case.⁶

1 Co. Litt. 203 b; *Dovaston v. Payne*, 2 Black. H. 530; 2 Chit. Plead. 261; *Lawson v. State*, 10 Ark. 28; 50 Am. Dec. 238; *Burrows v. Yount*, 6 Blackf. 458; 39 Am. Dec. 439; *Territory v. Ortiz*, 1 New Mexico, 5, 15.

2 *Dendy v. Powell*, 3 Mees. & W. 442; *Pearse v. Champneys*, 3 Dowl. Pr. 276; *Bartlett v. Prescott*, 4 N. H. 500; *Watriss v. Pierce*, 36 N. H. 238; *Winter v. Quarles*, 43 Ala. 692; *Hawes v. Ryder*, 100 Mass. 216.

3 See *Trustees etc. v. Odlin*, 8 Ohio St. 297; *Hazleton v. Union Bank*, 32 Wis. 34.

4 *Gray v. Coan*, 23 Iowa, 343; *Foster v. Elliott*, 33 Iowa, 216; *Clark v. Dillon*, 97 N. Y. 373; *Sullivan v. Dunphy*, 4 Mont. 499; N. Y. Code Civ. Proc. § 519; Cal. Code Civ. Proc. § 452; Nev. Code § 70; Ohio Rev. Stats. § 5096; *Malone v. Sherman*, 17 Jones & S. 530; *Southwick v. First Nat. Bank*, 84 N. Y. 428; *Prickhardt v. Robertson*, 4 N. Y. Civ. Proc. 122; *Gunn v. Madigan*, 28 Wis. 158; *Bushey v. Reynolds*, 31 Ark. 657; *Wilcox v. Hausch*, 57 Cal. 139; *Robinson v. Greenville*, 42 Ohio St. 625; *McCurdy v. Baughman*, Sup. Ct. Ohio, 1 N. E. Rep. 93.

5 *Farnsworth v. Holderman*, 3 Utah, 381; 3 West C. Rep. 342. And see § 10, *ante*.

6 *Olcott v. Carroll*, 39 N. Y. 436; § 247, *ante*.

7 *White v. Spencer*, 14 N. Y. 247; *Clay v. Edgerton*, 19 Ohio St. 549.

8 *Tooker v. Arnoux*, 76 N. Y. 397; *Neudecker v. Kohlberg*, 81 N. Y. 296; § 213, *ante*.

9 *Exchange Bank v. Ford*, 7 Colo. 314; 3 Pacif. L. Rep. 449.

10 *Bunge v. Koop*, 48 N. Y. 225; *Spear v. Downing*, 34 Barb. 522; *Clark v. Dillon*, 97 N. Y. 370.

11 *Mescall v. Tully*, 91 Ind. 96; *West. Union Tel. Co. v. Young*, 93 Ind. 118; *Johnston v. Greist*, 85 Ind. 503; *State v. Beal*, 88 Ind. 106; *Neidefer v. Chastain*, 71 Ind. 383; 36 Am. Rep. 198.

12 *West. Union Tel. Co. v. Reed*, 96 Ind. 195, 199.

§ 273. **Presumptions.**— Under the rule of liberal construction adopted by the Code system, every reasonable intendment and presumption is to be made in favor of a pleading.¹ But much greater latitude of presumption to sustain a pleading is allowed where the objection of insufficiency is first made at the trial, and not by demurrer.² Thus, if the question of the sufficiency of a complaint is raised for the first time, and only by an objection to the introduction of any evidence under it, courts will always construe its allegations very liberally, so as to sustain the complaint if it can be sustained.³ The court would be justified in construing a pleading more strictly upon a motion to strike out or render more definite, than upon a request to charge the jury that the pleading is to be disregarded.⁴ But a pleading which reasonably imports the averment of a good cause of action is not to be held bad, even on demurrer, because its language is susceptible of a construction excluding any such cause;⁵ the court will adopt a rational construction rather than one which makes the complaint an absurdity.⁶ And on appeal, every reasonable presumption will be indulged by the court above, in aid of the action of the court below, in finding upon the sufficiency of a pleading.⁷ But the law will not assume in favor of a party the existence of any fact that he has not averred,⁸ or accept as facts any mere conclusions of the party himself.⁹ The law does not presume that a party's pleadings are less strong than the facts of the case will warrant.¹⁰

1 *Morse v. Gilman*, 16 Wis. 504; *Black v. Drury*, 24 Tex. 289; *Quintard v. Newtown*, 5 Robt. 72.

2 *Bennett v. Judson*, 21 N. Y. 238; *Cady v. Allen*, 22 Barb. 394; *Hazleton v. Union Bank*, 32 Wis. 34; *White v. Spencer*, 14 N. Y. 247.

3 *Barkley v. State*, 15 Kan. 99.

4 *Barnsback v. Reiner*, 8 Minn. 59, 66. And see *Bank of Havana v. Magee*, 20 N. Y. 355; *Lounsbury v. Purdy*, 18 N. Y. 515.

5 *Olcott v. Carroll*, 39 N. Y. 436.

6 *Olcott v. Carroll*, 39 N. Y. 436.

7 *Evans v. Schafer*, 88 Ind. 92.

8 *Cruger v. Railroad Co.* 12 N. Y. 190; *State v. Central etc. Assoc.* 14 Mo. App. 596, 597.

9 *Malone v. Sherman*, 17 Jones & S. 530.

10 *Cruger v. Railroad Co.* 12 N. Y. 190, 201.

§ 274. *Ambiguities.*—As it regards matters of substance, the old common-law rule that the pleading is to be construed most strongly against the pleader, is held to prevail.¹ It is still the duty of a party to present a clear and unequivocal statement of his cause of action or defense, and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken.² All uncertainties and ambiguities arising on the face of the pleading are to be resolved against the pleader, since he has at all times the power, and it is his duty to make them plain.³ But the rule that a pleading must be taken most strongly against the pleader, where the language used is ambiguous, has no application where the pleader confesses that his pleading is ambiguous, and asks leave to amend.⁴

1 *Bates v. Rosekrans*, 23 How. Pr. 98; 34 How. Pr. 626, n.; *State v. Horner*, 10 Mo. App. 307, 312.

2 *Clark v. Dillon*, 97 N. Y. 370.

3 *Natlan v. Cameron*, 2 Dakota, 347, 362; *Wright v. McCormick*, 67 N. C. 27, 28; *Territory v. Ortiz*, 1 New Mexico, 5, 15; *Triscony v. Orr*, 49 Cal. 612, 617; *Rogers v. Shannon*, 52 Cal. 90, 107; *Beach v. Bay State Co.* 18 How. Pr. 335; 30 Barb. 433; *Patteson v. Baker*, 50 Barb. 432; 34 How. Pr. 180; *Burke v. Thorne*, 44 Barb. 363; *State v. Beal*, 88 Ind. 106.

4 *Nevada etc. Co. v. Kidd*, 28 Cal. 684. And see *Moore v. Moore*, 56 Cal. 89; *Krause v. Sacramento*, 48 Cal. 221; *Tidball v. Holley*, 43 Cal. 610.

§ 275. **Instances of construction unfavorable to pleader.**—Where allegations pertinent to two different causes of action, one *ex contractu* and the other *ex delicto*, are so blended together in the complaint that it is uncertain whether it is in tort or on contract, it is held that the complaint should be construed most unfavorably against the plaintiff.¹ In such a case, it was held that all the allegations not material to the cause of action on contract might properly be stricken out on motion, as irrelevant.² If it be doubtful whether the matter set up in an answer is intended merely to defeat the plaintiff's recovery, or to obtain affirmative relief, the construction should be most strongly against the defendant;³ as where an answer is susceptible of being construed to contain either of two defenses, one of payment, and the other a counter-claim, the answer should be construed as setting up only the defense of payment, and not considered as containing a counter-claim, and therefore requiring a reply.⁴ If the place is material, and the pleading is ambiguous as to the place, the presumption should be against the party whose pleading it is.⁵

1 *Ridder v. Whitlock*, 12 How. Pr. 208.

2 *Hunter v. Powell*, 15 How. Pr. 221. See § 218, *ante*.

3 *Bates v. Rosekrans*, 23 How. Pr. 98; 37 N. Y. 409.

4 *Bates v. Rosekrans*, 23 How. Pr. 98; 37 N. Y. 409; *Burke v. Thorne*, 44 Barb. 363. Compare *Lancaster Manuf. Co. v. Colgate*, 12 Ohio St. 353.

5 *Beach v. Bay State Co.* 18 How. Pr. 335; 30 Barb. 433; 10 Abb. Pr. 71.

§ 276. **General rules.**—Although pleadings are to be construed liberally, it is not meant by this that they shall be held to say what they do not.¹ The rule is, that a pleading must be construed according to what it says, and not what the pleader intended.² And language actually used in a pleading is to be construed according to its ordinary and common meaning.³ The

language used is to have a reasonable intendment and construction, and if capable of different meanings, that should be taken which will support the pleading, rather than one which will defeat it.⁴ Every allegation of a pleading should be considered in connection with the other allegations constituting the particular cause of action or defense;⁵ and general statements, which are evidently qualified by more particular subsequent averments, must be construed as thus qualified.⁶ Like any other sworn statement, a verified pleading must be construed so as to make all its parts, if possible, harmonize with each other.⁷ When the statement of facts constituting a cause of action will support either of two actions, and it is doubtful which the pleader intended, the demand for judgment or relief may in some cases be consulted, with a view of ascertaining which action was intended.⁸ And it is held that the explanations of the Code commissioners are entitled to much consideration in the construction of pleadings, though not binding as authority upon the court.⁹ In California, the headnotes to the chapters and titles in the Practice Act are entitled to more consideration in explaining the intention of the different sections, where the language is doubtful, than the title of the entire act.¹⁰ A well settled rule in the construction of a pleading is, that facts alleged must control, rather than the conclusions of the pleader;¹¹ the fact will be regarded, and the legal conclusion disregarded.¹²

1 *Cook v. Warren*, 88 N. Y. 37, 40.

2 *Gould v. Glass*, 19 Barb. 179; *Ogdensburgh Bank v. Van Rensselaer*, 6 Hill, 240. And see *Beach v. Bay State Co.* 30 Barb. 433; 10 Abb. Pr. 71; 18 How. Pr. 335; *Spear v. Downing*, 12 Abb. Pr. 437; 22 How. Pr. 30; 34 Barb. 522.

3 *Rathburn v. Railroad Co.* 16 Neb. 441, 443; *Woodbury v. Sackrider*, 2 Abb. Pr. 402; *Trustees etc. v. Odlin*, 8 Ohio St. 293, 297; *Hill v. Supervisors*, 19 Ohio St. 621.

4 *Allen v. Patterson*, 7 N. Y. 476, 480; *Morse v. Gilman*, 16 Wis. 504. And see *Olcott v. Carroll*, 39 N. Y. 436; *Quintard v. Newtown*, 5 Bobt. 72.

5 *Hatch v. Peet*, 23 Barb. 575; *Allemany v. Petaluma*, 38 Cal. 553; *Farish v. Coon*, 40 Cal. 83.

6 *Page v. Boyd*, 11 How. Pr. 415; *Laub v. Buckmiller*, 17 N. Y. 620.

7 *Ryle v. Harrington*, 14 How. Pr. 59; 4 Abb. Pr. 421. An allegation in a verified answer, in the present tense, strictly construed, does not avail the defendant as an allegation relating to the time of the transactions mentioned in the complaint: *Coulson v. Whiting*, 14 Abb. N. C. 60.

8 *Dows v. Green*, 3 How. Pr. 377; *Spalding v. Spalding*, 3 How. Pr. 277; *Rodgers v. Rodgers*, 11 Barb. 595. Compare *Read v. Lambert*, 10 Abb. Pr. N. S. 423; *Conaughty v. Nichols*, 42 N. Y. 83.

9 *Wood v. Dillingham*, 1 Handy, 29.

10 *Barnes v. Jones*, 51 Cal. 303.

11 *Jones v. Phoenix Bank*, 8 N. Y. 223.

12 *Jones v. Phoenix Bank*, 8 N. Y. 223; *Schenck v. Naylor*, 2 Duer, 675.

§ 277. **Words and phrases.**—Words used in a pleading will usually be construed in their popular and ordinary sense.¹ A restricted meaning should not be given to words which are clearly susceptible of a more liberal construction, unless the whole pleading shows that the language was used in its restricted sense, and especially when such restricted interpretation would exclude a defense on the merits.² But where a word used in a pleading has two different meanings, one the result of judicial or statutory definition, the other of inaccurate popular use, the latter can only be adopted in construing the pleading where it plainly appears from other averments, or the whole tenor of the pleading, that such was the sense in which it was employed.³ To adopt an opposite rule would introduce doubt and ambiguity in the room of certainty and precision, and make a pleading lose its utility as a means of accurately evolving an issue to be tried.⁴ It is however held, that when a word used has two meanings in law, differing in degree merely, it will be understood in its larger sense, unless it appears to have been employed in its narrower sense.⁵ As it regards the construction which has been given to particular words and phrases, it is held that acceptance implies due acceptance; ⁶ conversion means a *wrongful*

conversion ;⁷ taking imports a tortious or unlawful taking ;⁸ allegation of making a written instrument implies a delivery ;⁹ allegation of a sale implies a perfected sale by delivery ;¹⁰ indorsed means lawfully indorsed,¹¹ and includes delivery ;¹² averment that possession had been taken implies a legal possession ;¹³ an entry on lands means a lawful entry ;¹⁴ allegation of over-payment is construed to mean an over-payment in money ;¹⁵ the word "signed," applied to a promissory note, is a sufficient averment that the note was made ;¹⁶ allegation that a judgment was recovered, and that it is a lien, implies the fact of docketing the judgment ;¹⁷ the word "as" in a pleading was construed "which," in order to express what was intended by the pleader ;¹⁸ the word "fulfilled" is equivalent to the word "performed," as used in a statute declaring that, in pleading, it must be alleged that conditions were performed ;¹⁹ the phrase "as hereinafter stated," when of doubtful application, should be so applied as to support the pleading ;²⁰ at common law, the term "writing obligatory" in a pleading imports a sealed instrument ;²¹ in a recent case, it is held that whenever the word "obligation" is used in a statute as the name of a contract, an agreement in writing, sealed or unsealed, is referred to, and the term does not embrace or apply to oral contracts.²² Where a personal pronoun, designating a party to an action, immediately follows the names of both parties in a pleading, its antecedent is determined by the meaning intended ;²³ thus, if it clearly appears that the pronoun is intended to refer to the plaintiff, though grammatically it refers to the defendant, the pleading will be read as intended.²⁴ A reference in pleading to the "said premises," or to the "premises aforesaid," is neither uncertain nor defective, and is strictly correct.²⁵ Although a complaint contains two counts, one upon an

agreed price, and the second upon a *quantum meruit*, both claims arising out of one transaction, the pleading does not necessarily violate the injunction against "unnecessary repetition."²⁶ In an action against a corporation for false representations, the proper form of allegation in the complaint is that such representations were made by the defendant, and not that they were made by the defendant "by its officers and agents";²⁷ and if the complaint is drawn in the latter form, the plaintiff will be required to make it more definite and certain by declaring specifically the particular officers or agents by whom he claims such representations were made.²⁸

1 Woodbury v. Sackrider, 2 Abb. Pr. 402; Rathbun v. Railroad Co. 16 Neb. 441, 443; Walton v. Singleton, 7 Serg. & R. 449; Backus v. Richardson, 5 Johns. 476.

2 Close v. Nat. City Bank, 14 Abb. Pr. N. S. 326; 3 Jones & S. 251. And see Allen v. Patterson, 7 N. Y. 476.

3 Cook v. Warren, 88 N. Y. 37.

4 Cook v. Warren, 88 N. Y. 37.

5 Miller v. Miller, 83 Cal. 553.

6 Graham v. Machado, 6 Duer, 514; Bank of Lowville v. Edwards, 11 How. Pr. 216.

7 Young v. Cooper, 6 Ex. 259.

8 Childs v. Hart, 7 Barb. 370.

9 Keteltas v. Myers, 19 N. Y. 231; Prindle v. Caruthers, 15 N. Y. 425; Lafayette Ins. Co. v. Rogers, 30 Barb. 491.

10 Clark v. Meigs, 13 Abb. Pr. 467.

11 Mechanics' Bank v. Spring Valley Shot Co. 23 Barb. 419; Price v. McClave, 6 Duer, 544.

12 Bank of Lowville v. Edwards, 11 How. Pr. 216.

13 Butt v. Clark, 23 Ind. 548.

14 Turner v. McCarthy, 4 Smith, E. D. 247.

15 Mann v. Moorewood, 5 Sand. 557.

16 Price v. McClave, 6 Duer, 544.

17 Cady v. Allen, 22 Barb. 383.

18 Kelley v. Peterson, 9 Neb. 77.

19 Etna Ins. Co. v. Kittles, 81 Ind. 90.

20 Winans v. Insurance Co. 38 Wis. 342.

21 Clark v. Phillips, Hemp. 294.

22 Exchange Bank v. Ford, 7 Colo. 314; 3 Pacif. L. Rep. 447. Compare Crandall v. Bryan, 15 How. Pr. 53; Gage v. Nat. Bank, 79 Ill. 62; Strong v. Wheaton, 38 Barb. 616; Gale v. Myers, 4 Houst. 546.

23 *Steeple v. Downing*, 60 Ind. 478.

24 *Moore v. Beem*, 83 Ind. 219.

25 *Bastian v. Eau Claire*, 56 Wis. 172.

26 *Longprey v. Yates*, 18 N. Y. Week. Dig. 355; 31 Hun, 432. See *Vielle v. Insurance Co.* 65 How. Fr. 1.

27 *Schellens v. Equitable Life Ass. Soc.* 18 N. Y. Week. Dig. 556; 32 Hun, 235.

28 *Schellens v. Eq. L. Ass. Soc.* 18 N. Y. Week. Dig. 556; 32 Hun, 235.

§ 278. **Abbreviations.**—Where abbreviations or initials of words are used in pleadings, if, when taken in connection with the remainder of the pleading and subject-matter, they can be clearly understood, and not be ambiguous, the same effect will be given to them as if the words were written in full.¹ The descriptions of land in conveyances, surveys, assessments, etc., by initials, abbreviations, and figures, will be judicially noticed by the courts, without further explanation in the pleadings.² So the court will judicially notice the abbreviation "adm'r" for the word "administrator," and give effect thereto as if written out.³ So of an abbreviation of the name of a month, as "Octb." for "October."⁴ And it is well settled, that a party may properly be described in a pleading by a known and accepted abbreviation of his Christian name.⁵ But not by the initials only of his Christian name.⁶

1 *Odd Fellows' Buil'd. Assoc. v. Hogan*, 28 Ark. 261. The abbreviation "vs." and the word *versus* are, in legal practice, so far English words as not to be contrary to a statute requiring all pleadings to be in the English language: *Smith v. Butler*, 25 N. H. 521. So the abbreviation "etc." is English, and will not vitiate a pleading on the ground that it is expressive of Latin words: *Berry v. Osborn*, 28 N. H. 279.

2 *Kille v. Town of Yellowhead*, 80 Ill. 206; *Jordon etc. Assoc. v. Wagoner*, 33 Ind. 50.

3 *Moseley v. Mastin*, 37 Ala. 216.

4 *Kearns v. State*, 3 Blackf. 334. It was held that the courts would notice that the abbreviation "Ind.," as applied to a place, meant Indiana: *Burrough v. Wilson*, 59 Ind. 536, 538. But see *Ellis v. Park*, 8 Tex. 205; *Russell v. Martin*, 15 Tex. 238.

5 *Kemp v. McCormick*, 1 Mont. 420; *Weaver v. McElhenon*, 13 Mo. 89.

6 *Wieboldt v. Hermann*, 2 Mont. 609. And see *Gardner v. McClure*, 6 Minn. 250.

§ 279. *Allegations as to time.*—Dates are flexible in pleading,¹ and allegations of time are not generally material.² In the absence of averment to the contrary, allegations of time are presumed to refer to the conditions existing at the commencement of the action, whether in form in the present or past tense.³ Thus, an allegation that a party was entitled to dower, without specifying the time when the right attached, was held to mean that she was entitled to the dower estate recognized by law at the time the pleading was filed.⁴ So, in an action against husband and wife, upon a bond given by the latter, the caption of the complaint described him as "her husband," and it was held that this referred only to the time when the action was commenced, and did not amount to an allegation that she was a married woman at the time of giving the bond.⁵ But an allegation in a verified answer, in the present tense, strictly construed, does not avail the defendant as an allegation relating to the time of the transactions mentioned in the complaint.⁶ An answer referring to a certain day of a month, without mentioning any year, will be construed as having reference to the year mentioned in the complaint.⁷

1 *Zorkowski v. Zorkowski*, 3 Robt. 613.

2 *Backus v. Clark*, 1 Kan. 303; *Kansas Pac. Railw. v. McCormick*, 20 Kan. 107; *Serviss v. Stockstill*, 30 Ohio St. 418; *Gentry v. Doolin*, 1 Bush, 1. And see § 13, *note*.

3 *Townshend v. Norris*, 7 Hun, 239; *Burns v. O'Neil*, 10 Hun, 494; *McCormick v. Blossom*, 40 Iowa, 256. And see *McKay v. Jarvis*, 8 N. Y. Week. Dig. 155; *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Brown v. Galena Min. Co.* 32 Kan. 528.

4 *McCormick v. Blossom*, 40 Iowa, 256.

5 *Broome v. Taylor*, 9 Hun, 155. See S. C. modified, 76 N. Y. 564.

6 *Coulson v. Whiting*, 14 Abb. N. C. 60. Compare *Prindle v. Caruthers*, 15 N. Y. 425; *Wheeler v. Heermans*, 3 Sand. Ch. 597.

7 *Heebner v. Townsend*, 8 Abb. Pr. 234.

§ 280. *Of admissions.*—Where a party makes an admission in his pleading, that admission may be taken

most strongly against him on the trial.¹ But a party who desires to avail himself of an admission in a pleading must accept it as an entirety.² Thus, if the admission is coupled with an affirmative allegation, he cannot rely upon the admission unless he accept it as modified by the accompanying allegation.³ The whole of the statement must be taken and construed together;⁴ but this rule does not prevent the party from disproving the truth of the accompanying allegation.⁵ Under Codes which do not permit a party to set up inconsistent defenses, if a defendant admits anything in his answer, the admission will be taken as intended to modify and control anything else that may be found in the answer in apparent conflict therewith;⁶ as, for instance, whatever is admitted in a special defense operates so far as a modification of a general denial, and is to be taken as true, without other proofs.⁷ In other words, on the trial of a cause the general denial in an answer must be construed to be a denial only of all the material allegations of the complaint or petition not otherwise or elsewhere admitted in the answer.⁸ But the rule in some of the States is, that an admission made in one of several answers is not available against the others.⁹ But whatever has been admitted on both sides in the pleadings cannot be subsequently contradicted.¹⁰ And a party will not be permitted to amend on the trial by retracting an admission in his sworn pleading, unless it be upon very clear proof that he has been misled or deceived, or acted under clear mistake.¹¹ So, if a case has been submitted upon an agreed statement of facts, such statement cannot be withdrawn, or the agreement retracted by either party, except by leave of court on cause shown.¹² An admission in an answer that a deed was "executed" to the defendant, is in effect an admission that the deed was

signed, sealed, and delivered.¹³ An admission in the answer that at the time mentioned the defendant "made and indorsed a note like that set out in the complaint" was construed to refer to the note sued upon.¹⁴ From the admission of an indebtedness the law implies a promise to pay.¹⁵ So an averment that an agent had no authority to make an appointment for his principal until a vacancy should exist, is an admission of such authority in case the vacancy exists.¹⁶

1 Miller v. Moore, 1 Smith, E. D. 739, 743.

2 Rouse v. Whited, 25 N. Y. 170; Albro v. Figuera, 60 N. Y. 630; Goodyear v. De La Vergne, 10 Hun, 537; Wisby v. Bonte, 19 Ohio St. 247.

3 Vanderbilt v. Schreyer, 21 Hun, 537, 541.

4 Gildersleeve v. Landon, 73 N. Y. 609.

5 Mott v. Consumers' Ice Co. 73 N. Y. 543, 550.

6 See Curl v. Watson, 25 Iowa, 35; Moore v. Isbel, 40 Iowa, 383; Citizens' Bank v. Closson, 29 Ohio St. 73; Stephenson v. Leesburgh, 33 Ohio St. 475; Willey v. Keokuk, 6 Kan. 94; Barnum v. Kennedy, 21 Kan. 181; Bierer v. Fretz, 32 Kan. 329.

7 Willey v. Keokuk, 6 Kan. 94; Butler v. Kaulback, 8 Kan. 668; Miller v. Larson, 17 Wis. 624; Hartwell v. Page, 14 Wis. 49.

8 Butler v. Kaulback, 8 Kan. 668, 673.

9 Swift v. Kingsley, 24 Barb. 541; Mudd v. Thompson, 34 Cal. 39; Siter v. Jewett, 33 Cal. 92; Uridias v. Morrall, 25 Cal. 31; White v. Smith, 46 N. Y. 418.

10 Carter v. McCormick, 4 Colo. 136.

11 Miller v. Moore, 1 Smith, E. D. 739. And see Vanderbilt v. Accessory Transit Co. 9 How. Pr. 352; Reynolds v. West, 32 Ark. 244.

12 Ish v. Crane, 13 Ohio St. 574.

13 Thorp v. Keokuk Coal Co. 48 N. Y. 253.

14 Moody v. Andrews, 7 Jones & S. 302; 64 N. Y. 641.

15 Levinson v. Schwartz, 22 Cal. 229.

16 Horn v. West. Land Assoc. 22 Minn. 223.

CHAPTER XIV.

CODE PLEADING IN FEDERAL COURTS.

- § 281. Statutory provision on subject.
- § 282. Complaint or petition.
- § 283. Form and sufficiency of answer.
- § 284. Defects and remedies.

§ 281. **Statutory provision on subject.**—By express act of Congress (Act of June 1, 1872), pleadings in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, are required to conform, as near as may be, to the pleadings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held.¹ Thus, since the passage of this act, the rights of parties to civil actions in the Circuit and Districts Courts within the State of New York are to be ascertained, not by the rules of pleading at common law, but by those adopted by the Code of Civil Procedure of that State.² Accordingly, the plaintiff's first pleading in civil actions in those courts is now a complaint, framed in conformity to the principles of the Code, instead of a declaration as at common law, and the defendant's pleading is not a "plea," but an answer, framed also according to the Code.³ And for the same reason a demurrer, which is a pleading under the Code system,⁴ should conform to the rules regulating demurrers contained in the Code of that State.⁵ So, the practice under the Code of giving a party the right, as of course, to serve an amended pleading, is held to be entirely applicable to the courts of the United States.⁶ And, in short, when the provision above stated was first enacted, it immediately changed the forms and modes of

pleading in the federal courts within all those States whose local statutes had adopted a system of pleading unlike that which formerly existed.⁷ And the federal courts will now follow the decisions of the State Supreme Court on questions of pleading.⁸ A pleading in a suit at law in the federal court, which is not authorized in a like suit in a court of the State, will be set aside.⁹ But the conformity in pleading required by the statute has no application to cases in equity or admiralty.¹⁰ The two systems of law and equity must be kept separate and distinct in federal courts.¹¹ And where a suit in equity has been removed from a State court, it must proceed as an equity cause in the federal court.¹² In cases in the State court combining legal and equitable matters, repleader is necessary upon their removal into the federal court;¹³ the pleadings must then be framed anew, resolving the case into two, one at law and the other in equity.¹⁴ And where a suit at common law has been removed from a State court in which it has been conducted under the forms of procedure belonging to a court of equity, it is held that there must be a repleading to conform to the practice of the federal court as a court of law.¹⁵ But generally speaking, where an action at law is at issue when removed, no other or different pleadings are necessary than those in the State court,¹⁶ if by and through them the federal court can preserve the essential distinctions between legal and equitable modes of trial, and the substantial rights of the parties growing out of those distinctions.¹⁷

1 U. S. Rev. Stats. § 914. But this provision does not require those courts to adopt forms and modes of proceeding prevailing in the State courts, in cases where Congress has pointed out a course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued: *Easton v. Hodges*, 7 Biss. 324; *Turner v. Newman*, 3 Biss. 307.

2 *Muser v. Roberts*, Jr. Ct. N. Y. 17 Fed. Rep. 500; 16 Reporter, 193; *Sullivan v. Railroad Co.* 19 Blatchf. 388; 61 How. Pr. 490; 11 Fed. Rep. 848.

3 *Rosenbach v. Dreyfuss*, Dist. Ct. N. Y. 1 Fed. Rep. 391; *Merchants' etc. Nat. Bank v. Wheeler*, 13 Blatchf. 218; *Bills v. Railroad Co.* 13 Blatchf. 227.

4 See § 41, *ante*.

5 *Rosenbach v. Dreyfuss*, Dist. Ct. N. Y. 1 Fed. Rep. 391. And see *Chemung Canal Bank v. Lowrey*, 93 U. S. 72; *United States v. Nat. Bank*, Dist. Ct. N. Y. 10 Fed. Rep. 612; *United States v. Leverich*, Dist. Ct. N. Y. 9 Fed. Rep. 491.

6 *Rosenbach v. Dreyfuss*, Dist. Ct. N. Y. 1 Fed. Rep. 391. And see *West v. Smith*, 101 U. S. 263; *Whitaker v. Pope*, 2 Woods, 463.

7 See *Perkins v. City of Watertown*, 5 Biss. 320; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291; *Merchants' etc. Nat. Bank v. Wheeler*, 13 Blatchf. 218; *Knowlton v. Congress etc. Spring Co.* 13 Blatchf. 170; *Gause v. Knapp*, 1 McCrary, 75; 1 Fed. Rep. 222; *Republic Ins. Co. v. Williams*, 3 Biss. 370; *Nudd v. Burrows*, 91 U. S. 441.

8 *Taylor v. Brigham*, 3 Woods, 377. And see *United States v. Tilton*, 7 Ben. 306.

9 *Lewis v. Gould*, 13 Blatchf. 216.

10 *Blease v. Garlington*, 92 U. S. 1.

11 *Jones v. McMasters*, 20 How. 9; *Greer v. Mezes*, 24 How. 268; 1 McAr. 401; *Green v. Custard*, 23 How. 434; *Whittenton Manuf. Co. v. Packet Co.* Cir. Ct. Tenn. 19 Fed. Rep. 273, 275; *Van Norden v. Morton*, 99 U. S. 378; *Ex parte Boyd*, 105 U. S. 647; *Butler v. Young*, 1 Flippin, 276; *Benjamin v. Cavaroc*, 2 Woods, 163; *Montejo v. Owen*, 14 Blatchf. 324; *Steam Stone Cutter Co. v. Jones*, Cir. Ct. Vt. 13 Fed. Rep. 567.

12 *Neves v. Scott*, 13 How. 268; *Bennett v. Butterworth*, 11 How. 675; *Thompson v. Railroad Companies*, 6 Wall. 134; *Payne v. Hook*, 7 Wall. 425; *Van Norden v. Morton*, 99 U. S. 378.

13 *Thompson v. Railroad Companies*, 6 Wall. 134; *Montejo v. Owen*, 14 Blatchf. 324.

14 *La Mothe Manuf. Co. v. Nat. Tube Works Co.* 15 Blatchf. 432. And see *Flsk v. Union Pacif. R. R. Co.* 8 Blatchf. 299; *Sands v. Smith*, 1 Dill. 290.

15 *Whittenton Manuf. Co. v. Memphis etc. Packet Co.* Cir. Ct. Tenn. 19 Fed. Rep. 273.

16 *Merchants' etc. Nat. Bank v. Wheeler*, 13 Blatchf. 218; *Bills v. Railroad Co.* 13 Blatchf. 227. And see *West v. Smith*, 101 U. S. 263; *Duncan v. Gegan*, 101 U. S. 810.

17 *Whittenton Manuf. Co. v. Memphis etc. Packet Co.* Cir. Ct. Tenn. 19 Fed. Rep. 273. And see *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291; *Nudd v. Burrows*, 91 U. S. 441.

§ 382. **Complaint or petition.**—In cases where the jurisdiction of the federal courts depends upon the citizenship of the parties, the facts essential to support that jurisdiction must appear somewhere in the record,¹ but need not necessarily be averred in the pleadings.² But in a case where the only record is the complaint or petition, the necessary allegations must be contained

somewhere in that, and must be distinctly and positively averred, though not necessarily in the caption :³ as where a corporation is a party to an action, the allegations conferring jurisdiction on the federal courts need not appear in the caption of the complaint, if they appear in the body thereof, the complaint being the only record in the case.⁴ Or if the facts conferring jurisdiction are in some form affirmatively shown by the record, other than the pleadings, it will be sufficient.⁵ Thus, if the record shows that a suit brought in a State court was, by reason of the character of the parties, duly removed to the proper Circuit Court of the United States, the jurisdiction of the latter court is not lost for want of an averment of citizenship in the complaint originally filed, or in the amendments thereto, which were made in the Circuit Court.⁶ The sufficiency of the complaint is to be determined by the Code of the particular State,⁷ and the principle that only the ultimate facts need be pleaded, and not the subsidiary facts, which, in connection with the principles of law applicable thereto, go to make up the ultimate facts, is fully recognized.⁸ In an action to recover alleged excess of duties exacted by the collector on importations of goods, an averment that a certain sum of money in excess of the legal duty was exacted of the plaintiff, and paid by him under compulsion in order to obtain the goods, was held to be a sufficient averment of fact, and not a statement of a conclusion of law merely.⁹ Under the rules of pleading which obtain in the courts of New York, if the complaint sets forth a cause of action, either in tort or assumpsit, it is sufficient, and the plaintiff will recover such a judgment as the facts warrant, irrespective of the form of his action.¹⁰ And a complaint which sets forth that the parol contract sued on was valid under the law of the State where

it was made and to be performed, and that it was for a good consideration, is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action.¹¹ Under the Oregon Code, if a contract contains various substantive and independent stipulations, and there is a breach of more than one of such stipulations, there arise distinct causes of action, which should be pleaded separately;¹² different breaches of the same contract give rise to distinct causes of action.¹³ An averment in a complaint that the action involves "the construction and consideration of the laws of the United States," upon a specified subject, is insufficient to show a cause of action arising under the laws of the United States, and the complaint must state that there is a controversy between the parties as to the meaning and effect of those laws.¹⁴

1 Robertson v. Cease, 97 U. S. 646.

2 Railway Co. v. Ramsay, 22 Wall. 328.

3 Mexico Southern Bank v. Reed, Cir. Ct. Ohio, 8 Reporter, 7.

4 Mexico Southern Bank v. Reed, Cir. Ct. Ohio, 8 Reporter, 7.

5 Railway Co. v. Ramsay, 22 Wall. 328.

6 Briges v. Sperry, 95 U. S. 401.

7 See United States v. Tilton, 7 Ben. 306; Taylor v. Brigham, 3 Woods, 377; Muser v. Robertson, Cir. Ct. N. Y. 17 Fed. Rep. 500; 16 Reporter, 193; Castro v. De Uriarte, Dist. Ct. N. Y. 12 Fed. Rep. 250.

8 Muser v. Robertson, Cir. Ct. N. Y. 17 Fed. Rep. 500; 16 Reporter, 193. Compare § 272, *ante*.

9 Muser v. Robertson, Cir. Ct. N. Y. 17 Fed. Rep. 500; 16 Reporter, 193.

10 Austin v. Sellgman, Cir. Ct. N. Y. 18 Fed. Rep. 519; 16 Reporter, 674. See § 130, *ante*.

11 Liegeois v. McCracken, Cir. Ct. N. Y. 10 Fed. Rep. 664; 13 Reporter, 298.

12 Oh Chow v. Hallett, 2 Sawy. 259.

13 William v. Hallett, 2 Sawy. 261.

14 Holland v. Ryan, Cir. Ct. Colo. 17 Fed. Rep. 1; 3 Colo. Law Rep. 524; Gold Washing etc. Co. v. Keyes, 96 U. S. 199.

§ 283. **Form and sufficiency of answer.**—The sufficiency of the answer as well as of the complaint is to be de-

terminated by the State Code of procedure.¹ Under the New York Code, an answer which makes certain statements, and then denies every allegation of the complaint, "except as hereinafter stated or admitted," amounts to a sufficient general denial of all allegations of the complaint not admitted, to authorize evidence to be given to show any of such allegations to be untrue.² In a suit in a federal court sitting in New York, the question of the citizenship of the plaintiff can be raised by a special denial in the answer, but not by a general denial, and unless the answer contains such a special denial, proof cannot be given on the trial disputing the plaintiff's citizenship.³ Under the Arkansas Code, there is no difference in the method of pleading matter in abatement and matter in bar, and such matter must be pleaded with exactness and ought to be certain to every intent.⁴ Following the Missouri practice, affirmative matter of defense must be stated in answer, and cannot be proved under a general denial.⁵ Under the Oregon Code, special pleas or defenses may be pleaded with the general issue, or a denial of the allegations of the complaint.⁶ And the pleadings in an action for the infringement of a patent brought in the Circuit Court, sitting in Oregon, must be verified as provided in the Code of that State.⁷ Under such Code, a partial failure of consideration is not a defense to an action upon a promissory note, but must be set up as a counter-claim, in which case it must be pleaded and proved in the same manner as in a separate action thereon.⁸ A plea stating that the defendant is in possession as assignee of an unsatisfied mortgage, but which does not allege that he entered with the assent of the mortgagor, is frivolous, but not sham or redundant.⁹ Under the California Code, supplemental answers are in the nature of pleas *puis darrien continuance* under the former practice, and

should be interposed at the first opportunity after coming to the knowledge of the parties.¹⁰

1 United States v. Tilton, 7 Ben. 306.

2 Burley v. German-American Bank, 111 U. S. 216. And see § 60, *ante*.

3 Draper v. Springport, 15 Fed. Rep. 323; 15 Reporter, 677; 21 Blatchf. 240.

4 Ehrman v. Teutonia Ins. Co. Dist. Ct. Ark. 1 Fed. Rep. 471.

5 Walker v. Flint, 3 McCrary, 507; 11 Fed. Rep. 31; Mack v. Lancashire Ins. Co. 1 Fed. Rep. 193.

6 Cotlier v. Stimson, Cir. Ct. Oreg. 13 Fed. Rep. 639.

7 Cotlier v. Stimson, Cir. Ct. Oreg. 13 Fed. Rep. 639.

8 Packwood v. Clark, 2 Sawy. 546.

9 Wetherell v. Wiberg, 4 Sawy. 232.

10 French v. Edwards, 4 Sawy. 125.

§ 234. Defects and remedies.—In the United States Circuit Courts held in Missouri the following rules for pleadings have been agreed upon and prevail: (1) In pleading, the parties respectively must aver the issuable facts and nothing more. (2) If a pleading has not sufficient issuable facts to constitute a cause of action or defense, or is mixed with statements as to evidence to support the same, the opposite party may demur. (3) If a pleading is so vague and confused that the material and immaterial allegations are intermixed, or a mass of statements are contained therein, some issuable and others non-issuable, the opposite party may move to make the pleading more definite and certain. (4) But motions to strike out special clauses and sentences in a pleading will not be entertained.¹ Generally, under the Code system, if the allegations of a pleading are open to the objection of indefiniteness or uncertainty, the remedy is by motion to make more definite and certain.² Motion to make more definite and certain, and not demurrer, is the proper remedy for a too general statement of a fact in pleading.³ So objection to duplicity in pleading is to be made by a motion to strike out

the pleading rather than by special demurrer, as at common law.⁴ And irrelevant, impertinent, and scandalous matter in a pleading will, in a proper case, be stricken out on motion,⁵ but cannot be objected to by demurrer.⁶ And a demurrer does not lie to a part of a plea or defense, but must controvert its sufficiency as a whole.⁷ Under Codes which allow numerous and inconsistent defenses, if the answer contains any good defense, a demurrer to the whole answer must be overruled.⁸ A frivolous answer or defense may be stricken out on motion, but a motion to strike out for frivolousness is not well taken if the matter included in it is material, if true.⁹ When a demurrer to a complaint for failure to state a cause of action is overruled, the defendant, by answering, does not lose his right to have the judgment on the verdict reviewed for error in overruling the demurrer.¹⁰ The ancient rule in pleading, that upon demurrer the whole record is presented, and judgment goes against the party in whose pleading there is found the first substantial fault, is still applicable under the Code system,¹¹ and is fully recognized in the federal courts.¹²

1 Gause v. Knapp, 1 McCrary, 75; 1 Fed. Rep. 232.

2 Nels v. Yocum, Cir. Ct. Oreg. 1 Fed. Rep. 168. And see § 260, *ante*.

3 Muser v. Robertson, Civ. Ct. N. Y. 21 Blatchf. 368; 17 Feb. Rep. 500; 16 Reporter, 193.

4 McKay v. Campbell, Dist. Ct. Oreg. 1 Sawy. 374; 2 Abb. U. S. 120.

5 Wilkinson v. Pomeroy, 9 Blatchf. 513.

6 Lewis v. Oregon Cent. R. R. Co. Cir. Ct. Oreg. 8 Reporter, 358.

7 Lewis v. Oregon Cent. R. R. Co. Cir. Ct. Oreg. 8 Reporter, 358. See § 113, *ante*.

8 Dallas County v. MacKenzie, 94 U. S. 660.

9 Oregonian Ry. Co. v. Oregon Ry. & Nav. Co. Cir. Ct. Oreg. 22 Fed. Rep. 245.

10 Teal v. Walker, 111 U. S. 242.

11 See § 117, *ante*.

12 United States v. Central Nat. Bank, 10 Fed. Rep. 612.

INDEX.

INDEX.

[References are to sections.]

- Abandonment**, when facts constituting, need not be pleaded, § 119.
of corporate franchises as defense to action, 119.
allegation of, in action for divorce, 141.
of demurrer by answering over, 46.
- Abatement**, pleading matter in, 59.
distinction between pleas in, and pleas in bar abolished, 78.
matter in, and matter in bar may be set up together, 59, 78.
agreement to arbitrate as matter in, 113.
misnomer taken advantage of by plea in, 255.
how far pleas in, superseded by demurrer, 41.
- Abbreviations**, when full effect given to, in pleading, 278.
in descriptions of land judicially noticed, 278.
instances of, judicially noticed, 278.
initials of Christian name not recognized, 278.
those in common use may be employed, 35, n. 2.
- Abuse of process**. See MALICIOUS PROSECUTION.
distinguished from malicious prosecution, 167.
allegations and proof in action for, 167.
- Account**, what is, 120.
to what transactions applied, 120.
what constitutes, 120.
how pleaded, 120.
delivery of copy of, to adverse party, 120.
sufficiency of complaint in action on, 120.
filing copy of, with complaint, 120.
several may be united in complaint, 120.
when complaint in action on, not sustained, 120.
burden of proof on party disputing to show error in, 170.
action to surcharge and falsify, 196.
- BOONE PLEAD. — 45.

Account stated, what is, § 120.

what necessary to sustain action on, 120.

what amounts to averment of, 120.

fraud or error as defense to action on, 170.

Accounting. See PARTNERSHIP

who should be parties in action for, 121.

what will entitle a party to, 121.

what averments will sustain action for, 121.

defenses to action for, how pleaded, 121.

complaint in action for, between partners, 121,
179.

complaint in action for, against trustee, 121.

demand of, in redemption suit, 192.

by tenant for life for waste, 211.

**Accord and satisfaction, must be specially pleaded, 66,
67.****Act of Congress, requiring pleadings in federal courts to
conform to pleadings in State courts, 281.****Action. See SUIT.**

definitions of, 1.

what included in idea of, 1.

pleadings in, at common law, 3.

nature of pleadings in, under Codes, 5.

complaint or petition first pleading in, 7.

name of, not material under Code system, 8.

for use and occupation, when it lies, 162.

on an account, complaint in, 120.

for an accounting, parties, 121.

on bill or note, pleadings in, 123, 124.

on bonds and undertakings, pleadings in, 127, 128.

on promise to marry, pleadings, 129, 130.

for conspiracy, pleadings, 134.

in tort not joinable with, on contract, 135.

by or against corporation, pleadings, 138, 139.

for divorce, pleadings, 141, 142.

by or against executor or administrator, 143.

for goods sold and delivered, 150.

for malicious prosecution, pleadings, 167, 168.

for money had and received, 171.

for a nuisance, pleadings, 176.

by or against partners, 179, 180.

for a penalty, pleadings, 181.

for malpractice, pleading, 182.

of ejectment, pleadings, 184, 185.

for services, pleadings, 195, 196.

Action — Continued.

- of trespass, pleadings, §§ 207, 208.
- for waste, 211.
- on written instruments, 213.

Admission, of truth of matter pleaded by demurrer, 41, 118.

- to what extent demurrer operates as, 42, 118.
- by demurrer remaining upon record of court, 42.
- of allegations in complaint by failure to deny in answer, 64.
- conclusiveness of, by failure to deny, 64.
- when failure to reply does not amount to, 103.
- of truth of allegations in answer by demurrer, 118.
- of terms of foreign law by demurrer, 118.
- in pleading, how construed, 280.
- in pleading, how availed of, 280.
- in answer, effect of, 280.
- in one of several answers, construction, 280.
- on both sides cannot be contradicted, 280.
- amendment by retraction of, 280.
- particular instances of, construction, 280.

Adultery. See DIVORCE.

- counter-claim of, in action for divorce, 92.
- how alleged in pleading, 141.
- allegation as to place of commission, 141.
- allegation as to time of, 141.
- union of cause of action for, with one for limited divorce, 141.
- how pleaded in recrimination, 142.
- is a defense to action for limited divorce, 142.

Adverse possession, in ejectment cannot be shown under general denial, 69.

- when question of, may be raised without being pleaded, 69.

Agent, liability of principal on contract of, 122.

- implied authority to act for principal, 122.
- allegation of employment of, 122.
- action against, by third person for fraud, 122.

Aggravation. See DAMAGES.

- matter in, not admitted by failure to deny, 76.
- matter of, in action for breach of promise, 129.
- when plea of justification is of wrong, 164.

Agreed case, pleadings dispensed with in, 257.**Allegata et probata. See VARIANCE.**

- Allegation**, material, defined, § 64.
failure to deny, is an admission of, 64.
if immaterial, failure to deny does not admit, 64.
of time and place, 13.
of quantity or value, 14.
of fraud, 20, 67.
of demand, 21.
of knowledge or scienter, 24.
of title or ownership, 25.
- Ambiguity**, when complaint not faulty for, 15.
allegations in alternative, amount to, 54.
motion the usual remedy in case of, 54, 246.
reached by demurrer in California, 54.
waiver of objection on ground of, 269.
rule of construction in case of, 274.
- Amendments**, liberally allowed under Code pleading,
225.
general provisions as to, 225.
object of, in general, 225.
terms imposed on allowance of, 225, 241.
right to, as of course, 226.
what amounts to, 226.
waiver of right of, as of course, 226.
extent of right to, as of course, 227.
tests by which to determine what are, 227.
to answers, what allowable, 227, 231, 235.
instances of, allowed as of course, 228.
effect of, as of course, 229.
remedy of party aggrieved, when made in bad faith, .
230.
striking out, on motion, 230.
allowance of, on motion before trial, 231.
allowance of, after demurrer, 232.
allowance of, at the trial, 233.
conforming pleading to facts proved, 233.
allowance of, after trial, 234.
after remand of cause, 235.
allowance of, on appeal, 235.
when considered as made, 236.
defects cured by verdict or finding, 236.
instances of, allowed, generally, 237.
by whom made, 238.
power of referee to allow, 238, 242.
exercise of discretion in allowing, 239.
effect of, 242.

Amendments — Continued.

when not allowed, § 242.

waiver of error in refusing to allow, 242.

practice on allowing or refusing, 242.

Another action pending, when objection taken by demurrer, 49.

when remedy is by answer, 49.

in court of United States, or sister State, 49.

instances in which demurrer will not lie, 49.

proceeding construed as action, 49.

defense of, must be set up in answer, 67.

what answer must allege setting up as defense. 67.

Answer. See DEFENSE.

when defendant's remedy is by, 53.

definition and nature of, 53.

tenders an issue of fact, 53.

when defense must be made by, 53.

what to contain, in general, 59.

should be entitled, 59.

when to contain prayer for relief, 59.

nature of defense to be set forth in, 59.

two classes of defense allowed in, 59.

general or specific denials in, 60.

requisites of denials in, 61.

denying knowledge or information, 62

what may or may not be denied in, 63.

effect of omission to deny in, 64.

general denial, what shown under, 65.

new matter in defense, 63.

particular defenses, how set up in, 67.

setting up statute of frauds in, 68.

statute of limitations in, 69.

pleading statutes in, generally, 70.

setting up consideration in, 71.

justification as a defense in, 72.

leave and license, how pleaded in, 73.

contributory negligence in. 74.

denial of damages in, 75.

of matter in aggravation or mitigation, 76.

partial defenses in, 77.

joinder of defenses in, 73.

right of several defendants to join in, 79.

each defense in, must be complete, 80.

designation of separate defenses in, 80.

to be subscribed by party or attorney. 81.

Answer — Continued.

- when required to be verified, § 81.
- when verification of, may be omitted, 81.
- who may verify, 82.
- verification of, how made, 82.
- supplemental, what is, 83.
- supplemental, allowance of, discretionary, 83.
- supplemental, in what cases allowed, 83.
- supplemental, what set up in, 83.
- may contain new matter constituting counter-claim, 84.
- sufficiency of, raised by demurrer, 110.
- indefiniteness of, remedied by motion, 110.
- form and sufficiency of demurrer to, 111.
- sufficiency of complaint considered on demurrer to, 112.
- containing one good defense is not demurrable, 113.
- if bad, is good enough for bad complaint, 113.
- sufficiency of counter-claim set up in, 114.
- instances of demurrer sustained to, 115.
- when demurrer to, not sustained, 116.
- effect of demurrer to, 117.
- waiver of demurrer to, 117.
- how far demurrer admits facts pleaded in, 119.

Assault and battery, joinder of, with other action for injury to person, 37.

- evidence as to damages in action for, 76, 18, n. 11
- counter-claim in action for, 91, n. 2.

Assessments. See TAXES.

- on subscriptions, when enforceable, 203.
- presumed authority of corporation to make, 203.
- complaint by corporation in action to recover, 203.
- in what case stockholder cannot resist, 203, n. 14.
- action to recover back tax paid under, when void, 206.
- complaint to remove, as cloud on title, 206.

Assignment, of note, allegation of, in complaint, 123.

- of breach of bond in complaint, 128.
- of judgment, averment of, in complaint by assignee, 160.
- of statutory cause of demurrer, 111.

Argumentativeness, disallowed in pleading, 11.

- remedy against, in pleading, 246, 247.
- in a denial is seldom good, 61.

- Award**, must be specially pleaded, § 67.
 substance of, must be fully set forth, 67.
- Bailment**. See COMMON CARRIER, PLEDGE.
- Bankruptcy**, defense of, must be specially pleaded, 66, 67.
 how set forth in pleading, 67.
 supplemental answer setting up discharge in, 83
- Bills and notes**, imports a consideration, 123.
 in action on, consideration need not be averred, 123.
 description of, in complaint sufficient, 123.
 allegation of non-payment material, 123.
 averment of execution and copy of note, 123.
 sufficient averment of breach, 123.
 averment of delivery, 123.
 averment of ownership, 123.
 setting forth copy of, in complaint, 123.
 averment of presentment, refusal, and notice, 123.
 averment of protest not equivalent to allegation of notice, 123.
 complaint by assignee of, against maker, 123.
 suit by first indorser of, against second, 123.
 action by heirs at law upon, 123.
 averment as to acceptance, 123.
 action upon destroyed note, 123.
 payee must be alleged, 123.
 allegation as to indorsement and assignment, 123.
 variance between description and copy of, 123.
 allegation in action on, by corporation, 123.
 answer in action on, no consideration, 124.
 answer in action on, failure of consideration, 124.
 answer in action on, fraud, misrepresentation, etc., 124.
 answer in action on, alteration after execution, 124.
 answer in action on, mistake as to amount, 124.
 answer in action on, by surety, 124.
 answer in action on, by partner, 124.
 answer in action on, denial of delivery of, 124.
 answer in action on, denial of demand, refusal, etc., 124.
 answer in action on, plea of *non est factum*, 124.
 answer in action on, confession and avoidance, 124.
 answer in action on, excusing averment of due diligence, 124.
- Bill of particulars**, power of court to order, 125.
 scope and nature of, 125.
 to what actions appropriate, 125.

Bill of particulars—*Continued.*

- office of, § 125.
- may be ordered in behalf of plaintiff or defendant, 125.
- when party not entitled to, 125.
- no particular form required, 126.
- what must be set forth in, 126.
- how items stated in, 126.
- variance between proof and bill, 126.
- in action for divorce, 141.

Bonds. See UNDERTAKINGS.

- complaint in action on, by obligee, 127.
- delivery of, need not be averred, 127.
- statutory consideration need not be averred, 127.
- when demand should be averred, 127.
- breaches and damages to be set out, 127.
- sufficient allegation of breach of, 127.
- official, complaint in action on, 127.
- penal, action on, 127.
- of sheriff, complaint in action on, 127, 196.
- matter in discharge of, to be specially pleaded, 128.
- matter in avoidance of, illegally taken, 128.
- plea of performance in answer, 128.
- official, answer to action on, 128.
- answer in action on, when bad on demurrer, 128.
- penal, traverse of breach of, 128.
- action on lost, answer, 128.
- township, action on, 128.
- pleading, surrender of, in answer, 128.
- consideration of, evidenced by seal, 128.
- presumption of, consideration rebutted in answer, 128.
- showing want of consideration in answer, 128.
- answer by surety in action on, 128.
- plea of *nil debet* in action on, 128.

Breach. See BONDS.

- of promise to marry, action for, 129, 190.
- of contract, how pleaded, 26, 135.
- of bond, sufficient assignment of, 127.
- of condition of bond, answer in action for, 128.

Breach of promise to marry, when action for, is maintainable, 129.

- what must be averred in complaint for, 129.
- what averments not necessary in action on, 129.
- allegations as to damages in action on, 129.

- Breach of promise to marry — *Continued.***
infant not liable in action on, § 129.
ratification of promise by infant, 129.
promise to marry inferred from circumstances, 129.
identification of parties in complaint, 129.
defense of infancy in action for, 130.
plea of void promise in action on, 130.
matter in mitigation of damages, 130.
what may be shown under general denial, 130.
matter in aggravation of damages, 130.
what is no defense in action for, 130.
unchaste character of plaintiff in action for, 130.
- Capacity to sue, want of, how objected to, 48.**
when demurrer for want of, is proper, 48.
when objection to want of, taken by answer, 48.
waiver of objection to want of, 48, 262.
instances of waiver of objection to want of, 262.
objection that plaintiff is alien enemy, 262, n. 2.
- Caption, is part of complaint or petition, 8.**
is to be regarded in construing pleading, 8.
venue to be stated in, 8.
names of all parties to be stated in, 9.
how names should be stated in, 9.
jurisdiction of federal court need not necessarily appear in, 282.
- Cause of action, defined, 36.**
is substantially a breach of duty, 36.
must stand or fall by itself, 36.
facts constituting, cannot be subdivided, 36.
single, what constitutes, 38.
each contract affords one only, 38.
in case of torts, 38.
different acts of fraud treated as, 38.
party cannot be compelled to join such as are distinct, 38.
- Certainty, required in all pleadings, 3, 4, 10, 15.**
want of, generally remedied by motion, 54, 246, 284.
remedy for want of, by demurrer in California, 54.
waiver of objection to want of, 269.
- Civil damage act, cause of action created by, 131.**
grounds of action under, 131.
what included in remedy given by, 131.
complaint in action under, 131.
insufficiency of complaint in action under, 131.
defenses to action under, 131.

- Claim and delivery**, nature of proceedings, § 132.
forms of pleading in, must follow statute, 132.
wrongful detention must be averred, 132.
what complaint must allege generally, 132.
allegation of ownership in plaintiff, 132.
what general denial puts in issue, 132.
when complaint in action for, is bad, 132.
when demand and refusal to be averred, 132.
special damages to be specially alleged, 132.
when defendant is entitled to damages, 132.
effect of failure to deny allegation of damages, 132.
lies only for personal chattel, 132.
complaint asking judgment for value of property, 132.
amendment of complaint in action for, 242.
effect of demurrer to answer in action for, 118.
- Codes of procedure**, where in force, 5.
nature of pleadings under, 5.
system of pleading under, is a fact system, 5.
supply their own rules of pleading, 5.
have abolished pre-existing forms, 5, 6.
parts of pleading under, 6.
two classes of defense allowed under, 59.
demurrer and answer under, 58, 243.
amendments liberally allowed under, 225, 226.
pleadings under, adopted in federal courts, 281.
- Common carrier**, what complaint in action against, should allege, 133.
avermient as to compensation to, 133.
allegation as to tender of fare, 133.
complaint in action by consignor against, 133.
action against, for loss of draft, 133.
exemption of, from liability, 133.
defenses to actions against, 133.
action against, on special contract, 133.
action against, for non-delivery of goods, 133.
- Common counts**, abolished under Code system, 36.
court may allow, where good reason exists, 36.
where ground of recovery is uncertain, 36.
compelling election or striking out in case of, 36.
for work and labor, 195.
for goods sold and delivered, 150.
for money had and received, 171.
- Complaint or petition**, first pleading on part of plaintiff, 7.
what to contain, in general, 7.

Complaint or petition — *Continued.*

- caption is part of, § 8.
- name of court and of county to be stated in, 8.
- must contain names of parties, 9.
- mode of naming parties in, 9.
- designation of representative capacity of parties in, 9.
- designation of State as party in, 9.
- general rule as to statement of facts in, 10, 36.
- what facts to be alleged in, 10.
- facts as they exist to be set forth in, 10.
- what should not be stated in, 10, 11.
- facts, how alleged in, 11.
- ought not to anticipate defenses, 11.
- should not set forth legal conclusions merely, 11.
- should not allege matters judicially noticed, 12.
- allegations of time and place in, 13.
- allegations of quantity or value in, 14.
- facts to be stated positively in issuable form, 15.
- facts to be stated concisely, 16.
- one cause of action in, to be stated but once, 16, 36.
- allegations in, must be consistent, 17.
- may unite legal and equitable causes of action, 17.
- instances of inconsistent demands in, 17.
- may state several grounds for relief, 17.
- avermment of damages in, 18.
- averring special damages in, 18.
- averring consideration in, 18.
- how fraud is alleged in, 20.
- allegation of demand in, 21.
- allegations of performance of conditions, 22.
- averring notice in, 23.
- avermment of knowledge or scienter in, 24.
- allegation of title or ownership, 25.
- how contract is set forth in, 26.
- attaching copy of instrument as exhibit, 27.
- instrument attached forms no part of, 27.
- excuse for omission to attach exhibit, 27.
- pleading instrument for payment of money, 28.
- how statute is set forth by, 29, 70.
- how ordinance is set forth by, 29.
- on judgment, averment of jurisdiction, 30.
- averring corporate existence, 31.
- averring representative character, 32.
- demand of relief or judgment in, 33.

Complaint or petition — *Continued.*

- verification of, § 34.
- should be written in ink or printed, 35.
- matters of inducement in, 35.
- should separately state causes of action, 35.
- must be subscribed by party or attorney, 35.
- should be dated, 35.
- separate counts in, not allowed, 36.
- joinder of causes of action in, 37.
- single cause of action in, 38.
- election of remedy, 39.
- supplemental, nature of, 40.
- nature and effect of demurrer to, 41, 42.
- demurrer confined to face of, 43.
- effect of not demurring to, 45.
- grounds of demurrer to, 47, 54.
- in action upon bill or note, 123.
- in action upon bond or undertaking, 123.
- for breach of promise to marry, 129.
- in claim and delivery, 132.
- in action for conversion, 136.
- in action by or against corporation, 138.
- in action for divorce, 141.
- in actions by or against executors and administrators, 143.
- in foreclosure, 144.
- in forcible entry and detainer, 146.
- in cases of fraud, 147.
- for goods sold and delivered, 150.
- in actions on policies of insurance, 155, 156, 213.
- of intervention, 159 *a*.
- in actions on judgments, 160.
- in actions for libel or slander, 163, 200.
- for malicious prosecution, 167.
- for money had and received, 171.
- in actions by and against municipal corporations, 172.
- in cases of negligence, 169, 174.
- in partnership cases, 179.
- for possession of land, 184.
- in action to quiet title, 186.
- in action for services, 195.
- in action by or against sheriff, 198.
- for specific performance, 201.
- on stock subscriptions, 203.

Complaint or petition—*Continued.*

- in actions by or against sureties, § 204.
- in trespass, 207.
- for construction of will, 212.
- on written instruments, 213.
- variance between averments in, and proof, 214, 223.
- variance between, and summons, 224.
- amendment of, at trial, 233.
- amendment of, after demurrer, 232.
- amendment of, as of course, 228.
- correction of formal defects in, 243-251.
- waiver of filing of, 260.
- when deemed sufficient, 272.
- sufficiency of, in federal courts, 282.
- remedy for indefiniteness in, 246, 248, 284.

Conclusions of law, should not be set forth in pleading, 11.

- are such as give no facts but only matter of law, 11.
- instances of, 11.
- denial of, puts no fact in issue, 63.
- not admitted by demurrer, 42.

Conditions, averring performance of, 22, 195, 205.

- setting out excuse for non-performance, 22.
- performance of, how pleaded, 22, n. 4.
- when strictness in averring performance required, 22.
- mutual, pleading in case of, 22.
- when tender of performance of, not necessary, 22.
- traverse of alleged breach of, 123.
- in contracts of subscription to stock, 203.
- precedent, averment of waiver of, 203.

Confession and avoidance, matter in nature of, 61, 66.**Consistency,** required in pleading, 17.

- want of, construed against pleader, 17.
- must pertain to causes of action united, 17.
- instances of, in pleading, 17.
- want of, remedied by motion, 251.
- between relief granted and case made, 33.

Consideration, when gist of action must be specially averred, 19, 218.

- how set out in pleading, 19.
- need not be alleged in action on sealed instrument, 19.
- no allegation of, necessary in action on bill of exchange, 19, 123.
- if executory agreement must be pleaded, 19.

Consideration — Continued.

- words "for value received" imports, § 19.
- for indorsement of note, allegation of, 123.
- want or failure of, as defense to action on note, 71, 124.
- want of, how shown in defense, 71.
- failure of, to be pleaded specially, 71.
- extent of want of, as a defense, 71.
- illegality of, must be specially pleaded, 71.

Conspiracy, when subject of civil action, 134.

- when necessary to be averred and proved, 134.
- how averred in complaint, 134.
- insufficient averment of, 134.
- complaint in action for, must be specific, 134.

Construction, of statute allowing counter-claims, 87.

- of pleading, rule of common law, 272.
- of pleading, rule under Code system, 272.
- rule of, liberal under Codes, 272, 277.
- liberal rule of, limited to matters of form, 272.
- allegation and the proof must correspond, 272.
- the judgment must follow the pleadings, 272.
- of complaint, rule applied to, 272, 273, 275.
- presumptions in favor of pleading, 273.
- stricter rule of, applied upon motion to strike out or make more definite, 273.
- rule of, in regard to matters of substance, 274.
- in case of ambiguous pleading, 274.
- instances of, unfavorable to pleader, 275.
- pleading must be construed according to what it says, 276.
- of language, according to its ordinary meaning, 276, 277.
- of verified pleading, 276, 279.
- reference to demand for judgment or relief, 276.
- facts alleged must control rather than conclusions, 276.
- fact regarded and legal conclusion disregarded, 276.
- of words and phrases in pleadings, 277.
- of word having different meanings, 277.
- of abbreviations in pleading, 278.
- of allegations as to time, 279.
- of admissions in pleading, 280.
- of pleadings in mandamus, 168 a.

- Contract**, how set forth in complaint, §§ 26, 135.
may be stated according to legal effect, 26.
to be set forth as altered, 26.
breach of, how pleaded, 26, 140.
action on, cannot be united with action on tort, 135.
material facts only to be set forth in action on, 135.
sufficient averments in complaint on, 135.
breach of, how stated in complaint, 26, 135.
suit for money demand on, 135.
pleading on, according to legal effect, 135.
presumption that complaint correctly states, 135.
when copy of, need not be set out, 135.
parol, how pleaded, 135.
complaint on, for sale of real estate, 135.
all obligees must join in action for breach of, 135.
for purchase of land, allegation of tender of conveyance, 135.
allegation of damages in action for breach of, 140.
what damages recoverable in action on, 140.
to what damages plaintiff's recovery is limited, 140.
pleading when rescission of, is sought, 104.
- Contribution**, when *prima facie* case for, is made, 205.
what complaint for, should show, 204.
when right of action for, accrues, 204.
not necessary to allege payment under compulsion of suit, 204.
pleading facts rebutting equity to, 205.
effect of extension of time to co-surety, 205.
- Conversion**, defined, 136.
foundation of right of action for, 136.
sufficiency of allegations in complaint for, 136.
insufficient averment of, 136.
allegation of plaintiff's ownership, 136.
action for, by administrator, 136.
allegation of value of property converted, 136.
description of property converted, 136.
averment of demand and refusal, 136.
measure of damages in action for, 136.
demand of relief in action for, 136.
waiver of tort in action for, 136.
of notes, complaint in action for, 136.
evidence under general denial in action for, 137.
defenses in action for, 137.
general denial and justification inconsistent as defense in action for, 137.

Conversion — Continued.

of note, defense to action for, § 137.
 estoppel as defense in action for, 137.
 of thing pledged by pledgee, 183.
 construction of term in pleading, 277.
 estoppel of plaintiff to claim title as defense to
 action for, 222.

rejection of allegation of, as surplusage, 132, 135.
 evidence in mitigation in action for, 76.

Corporation, existence of, how pleaded, 31, 138.

foreign, averments as to existence of, 31.
 complaint in action by or against, 31, 138.
 remedy for omission to allege existence of, 138.
 designation of name in suit against, 138.
 allegation of capacity in action by or against, 138.
 insufficiency of complaint in action against, 138.
 what complaint in action by, must allege, 138.
 action by, on stock subscription, 138.
 existence of, how put in issue, 139.
 answers to actions by and against, 139.
 answer of *nul tiel* corporation, 139.
 when existence of, admitted, 139.
 question of power of, to be specially pleaded, 139.
 pleading extinction of, 139.
 when denial of existence of, sticken out of answer,
 139.

legality of election of officers, 139.
 actions against, for negligence, 174.
 actions by, on stock subscriptions, 203.
 action against, for false representation, 277.
 may deny on information and belief, 62.
 raising issue as to existence of, 62.

Counter-claim, what is meant by, 84.

is a cause of action in favor of defendant, 84, 88,
 114.

test as to admissibility of, 84, 114.
 what does not constitute, 84.
 what claims or demands embraced in, 85.
 includes set-off and recoupment, 85.
 extent of, limited in some States, 85.
 may generally be for liquidated or unliquidated
 damages, 85, 89.
 may be of an equitable or legal defense, 85.
 as affected by parties to action, 86.
 in actions by or against partners, 86.

Counter-claim — Continued.

- affirmative judgment on, not allowed against State, § 86.
- in actions by or against sureties, 86.
- statute allowing, is liberally construed, 87.
- connection of, with subject of action, 87.
- what may not be subject of, 87.
- in actions on contract, 88.
- test of sufficiency of, on contract, 88.
- claim barred by limitation not available as, 88.
- in cases of tort, 89.
- when may be set up, general rule, 89.
- in actions for services, 90.
- assault and battery, 91.
- in actions for divorce, 92.
- in foreclosure cases, 93.
- in actions between landlord and tenant, 94.
- in actions for goods sold, 96.
- in actions relating to real property, 96.
- in action for breach of contract of sale, 97.
- in action to restrain use of trade-mark, 97.
- in actions against carriers, 97.
- in actions on notes, 97.
- covenant not to sue as, 97.
- setting up fraud as, 97.
- in what cases not pleadable, 98.
- usury not usually subject of, 98.
- when matters of tort not pleadable as, 98.
- must be founded on existing demand, 99.
- defeat of, by assignment, 99.
- claims in different rights as subject of, 99.
- defendant not obliged to set up, 100.
- may be enforced in separate action, 100.
- when not subject of independent action, 100.
- waiver of, 100.
- how matter constituting, is pleaded, 101.
- need not answer whole of plaintiff's action, 101.
- grounds of demurrer to, 111, 114.
- form and sufficiency of demurrer to, 111.
- when demurrer to, goes back to complaint, 112.
- remedy for irrelevant or redundant matter in, 114, 116.
- judgment on overruling demurrer to, 117.
- of adultery and cruelty in action for divorce, 142.

Coverture. See HUSBAND AND WIFE.

must be pleaded to avail as a defense, § 67.

Cross-complaint. See CROSS-PLEADING.

nature of, 102.

expressly provided for in some States, 102.

statement of facts in, 102.

defects in, not cured by other pleadings, 102.

when plaintiff is defendant to, 102.

no provision for, in New York, 102.

in action for recovery of real estate, 102.

in action to quiet title, 102.

in attachment suit, 102.

in foreclosure suit, 102.

when bad on demurrer, 102.

is reached by demurrer to reply, 112.

Cross-pleading, in chancery, nature of, 102.

provision for cross-complaint, 102.

what cross-complaint must contain, 102.

not expressly provided for in New York, 102.

sufficiency of, 102.

when assailable by demurrer, 102.

in action to quiet title, 102.

in attachment suit, 102.

in foreclosure suit, 102.

Damages, when special must be specially averred, 18, 140.

in action for breach of contract, 140.

how alleged in pleading, 18, 140.

what a sufficient allegation of, 140.

exemplary, when allowed, 140.

evidence of, in action for personal injury, 140.

treble, allegation of, 140.

insertion of, in complaint by amendment, 140.

implication of, in action on money contract, 140.

burden of proof to establish, 140.

facts in mitigation of, 140.

no more recoverable than are claimed, 18.

special, confined to actions in tort, 18.

should be pleaded with fullness and accuracy, 18.

in actions for libel or slander, 18, 164, 200.

in action for assault and battery, 18.

in action of trespass, 18, 207, 208.

in action for malicious prosecution, 18, 167.

in action for possession of land, 18, 184.

for failure to deliver goods, 18, 133.

Damages — *Continued.*

- for breach of promise to marry, § 129.
- denials of, in answer, 75.
- pleading matter in aggravation or mitigation of, 76.
- proof of matter in reduction under general denial, 76.

Death, negligence causing, complaint in action for, 174.
damages for causing, under civil damage act, 131.

- Defense**, facts constitute, under Code pleading, 59.
- true nature of, to be set forth in answer, 59.
 - two classes of, denial and new matter. 59.
 - in abatement or bar, 59.
 - nature of denial, general or special, 60-63.
 - effect of omission to deny, 64.
 - what shown under general denial, 65.
 - new matter in, what is, 66.
 - particular, how interposed, 67.
 - accord and satisfaction, 67.
 - another action pending, 67.
 - alien enemy, 67.
 - award, 67.
 - bankruptcy, 67.
 - coverture, 67.
 - duress or coercion, 67.
 - estoppel, 67.
 - fraud, 67.
 - misnomer, 67.
 - record of judgment, 67.
 - infancy, 67.
 - usury, 67.
 - statute of frauds, 68.
 - statute of limitations, 69.
 - want of consideration, 71.
 - failure of consideration, 71.
 - illegal consideration, 71.
 - justification, 72.
 - leave and license, 73.
 - negligence, 74.
 - partial, must be pleaded as such, 77.
 - joinder of, 78.
 - what defenses may be joined, 78.
 - how far inconsistency between defenses allowed, 78.
 - equitable, may be pleaded to legal cause of action, 78.
 - rule as to pleading jointly by several, 79.
 - each must be complete in itself, 80.
 - cannot be aided by reference to other defenses, 80.

Defense—Continued.

- different defenses to be separately stated, § 80.
- how separate defenses designated, 80.
- what may be set up in supplemental answer, 83.
- sham defense, what is, 252.
- if sham may be stricken out on motion, 252.
- in what sense demurrer is not, 252.
- motion for judgment on, as frivolous, 253.

Definitions, of action, 1.

- suit, 1.
- pleading, 2.
- demurrer, 3, 41.
- answer, 58.
- counter-claim, 84.
- account, 120.
- account stated, 120.
- conversion, 136.
- interpleader, 159.
- intervention, 159 *a*
- departure, 105.
- variance, 214.
- new matter, 66.

Demand, when necessary to allege in pleading, 21.

- in action for detention of chattel, 21.
- how alleged in pleading, 21.
- when made to fix liability of sureties, 21.
- of principal debtor to render guarantor liable, 21.
- of one of two joint debtors, 21.
- not necessary in action on demand note, 21, n. 1.
- allegation of, made at particular place, 21, n. 7.
- in action to enforce collection of tax, 206.

Demurrer, nature and office of, 41.

- raises an issue of law, 41, 42.
- were general or special at common law, 41, 243.
- is a pleading under Code system, 41.
- grounds of, prescribed by statute, 41, 53, 110.
- effect of, 42.
- confined to face of complaint or petition, 43.
- must specify grounds of objection, 44.
- to jurisdiction of court, 44, 47.
- for want of sufficient facts, 44.
- defendant cannot demur and answer to same matter, 44.
- effect of not demurring, 45.
- waiver or abandonment of, 46.

Demurrer — Continued.

- for want of capacity to sue, § 48.
- lies for another action pending, 49.
- when not sustained for other action pending, 49.
- for misjoinder of parties, 50.
- for defect of parties, 51.
- causes of action improperly joined, 52.
- for no cause of action stated, 53.
- ambiguity as ground of, 54.
- bad in part and in part good, 55.
- must reach whole cause of action, 55.
- when adjudged frivolous, 56.
- amendments after decision of, 57, 117.
- to answer for insufficiency, 110.
- what defects in answer reached by, 110.
- to amended answer, 110.
- to answer, form and sufficiency of, 111.
- grounds of, to counter-claim, 111.
- sufficiency of prior pleadings considered on, 112, 117, 284.
- when not sustained to a pleading, 113.
- does not lie to answer containing one good defense, 113.
- when sustained to counter-claim, 114.
- instances of, sustained, 115.
- when not sustained to answer, 116.
- to answer, effect of, 117.
- to answer overruled, pleading over, 117.
- waiver of exceptions to rulings on, 117.
- admits facts well pleaded, 118.
- what allegations not admitted by, 118.
- amendment of pleading after, 232.
- defects met by, at common law, 243.
- defects not met by, under Codes, 243.
- may not be stricken out as sham, 252.
- may be stricken out if frivolous, 253.
- when adjudged frivolous, 56, 255.
- frivolous counter-claim is reached by, 255.
- judgment on, as frivolous may be moved for, 255.
- waiver of, by pleading over, 270.
- waiver of error in sustaining or overruling, 270.
- what objections not waived by pleading over, after, 270.

- Departure**, in pleading, what is, § 105.
inconsistency between reply and complaint constitutes, 105.
particular instances of, 105.
by introducing new causes of action in reply, 105.
how taken advantage of, 105, 109, 161.
- Discretion**, of court in allowing or refusing amendments, 233, 239.
abuse of, not presumed, 239.
of referee in denying amendment, 239.
remedy in case of abuse of, 239.
in allowing or refusing defense of statute of limitations, 239.
in imposing terms on amendment, 241.
instances of abuse of, in allowing amendments, 233, 239.
- Divorce**, what complaint in action for, should contain, 141.
sufficiency of complaint in action for, 141.
fact of marriage to be stated, 141.
for adultery, allegations in complaint, 141.
bill of particulars in action for, 141.
what facts constitute cause of action for, 141.
union of causes of action for, 141.
allegations in complaint praying separation, 141.
on ground of habitual intemperance, 141.
allegation of fact of residence, 141.
allegation of abandonment, 141.
pleas in bar to action for, 142.
recrimination in answer to action for, 142.
defenses to action for, 142.
counter-claim to action for, 142.
- Duress**, answer setting up, must aver facts constituting, 67.
when complaint does not state case of, 171.
- Ejectment**, is an action for possession of land, 184.
form of complaint in action of, 184.
what should be set forth in complaint, 184.
sufficient allegation of estate in premises, 184.
averment of withholding of possession, 184.
when facts to be set out particularly, 184.
ultimate facts only to be averred, 184.
when complaint insufficient on demurrer, 184.
averments showing right to possession, 184.
allegation as to entry on land, 184.
description of property in complaint, 184.

Ejectment—Continued.

- remedy for imperfect description of land, § 184.
- damages if sought must be alleged, 184.
- what a sufficient allegation of damages, 184.
- complaint in action by tenant in common, etc., 184.
- failure to define plaintiff's interest is fatal, 184.
- for dower, sufficiency of complaint, 184.
- may be united in same complaint for rents and profits, 184.
- joinder with causes of action for rents and profits and partition, 184.
- complaint in, may be for separate parcels of land, 184.
- trespass and trespass *quare clausum* cannot be joined with, 184.
- material allegations in complaint only to be defended against, 185.
- what allegations in complaint are material, 185.
- what defendant may show under general denial, 185.
- denial of plaintiff's title in answer, 185.
- what amounts to denial of plaintiff's title, 185.
- what amounts to general denial in answer, 185.
- denial of entry and ouster in answer, 185.
- asserting right to set off value of improvements, 185.
- equitable defense may be set up in answer, 185.
- facts constituting equity must be pleaded, 185.
- equitable estate in defendant as defense, 185.
- defendant's claim of title in answer, 185.
- Estoppel**, facts constituting, must be pleaded, 67.
- as affecting title in action for conversion, 67.
- Execution**, of note, denial of, in answer, 71.
- of instrument, allegation of, in pleading, 11.
- of note, time of a traversable fact under Colorado Code, 123.
- action against sheriff for failure to return, 198.
- Executors and administrators**, how to sue, 32, 143.
- what complaint in action by, must allege, 32, 143.
- how representative capacity is alleged, 143.
- need not make profert of letters testamentary, etc., 32.
- appointment, how averred, 32, 143.
- complaint in action by, for trespass, 143.
- allegations of complaint in action against, 32, 143.
- how allegation of representative capacity is put in issue, 143.

Executors and administrators — Continued

answers and defenses to actions by and against, § 143.

plea of *ne unques administrator*, 143.

action upon judgment obtained against, 161.

Exhibit, attaching copy of instrument as, 27.

substitute for prayer of *oyer*, 27.

forms no part of pleading, 27.

omission of, must be explained, 27.

what excuses omission to file, 27.

Extension of time. — See SURETY.**Facts, only required to be stated in pleading, 3, 5.**

general rule as to statement of, 10.

nature of, which are required to be set forth, 10.

evidence of, not to be stated, 11.

must be averred directly and positively, 11, 15.

if not necessary to be proved, should not be stated, 11.

judicially known should not be alleged, 12.

must be concisely stated, 16.

which may be set up in supplemental pleading, 40, 83.

remedy for indefinite statement of, 244, 246.

Failure of proof, what is meant by, in pleading, 217.

how distinguished from variance, 217.

amendment seldom allowed in case of, 217.

instances of, 219, 221.

Federal courts, pleadings in, to conform to pleading in State courts, 281.

follow decisions of State court on questions of pleading, 281, 282, 283.

pleading not authorized in State court set aside, 281.

follow former system of pleading in equity and admiralty cases, 281.

law and equity must be kept separate in, 281.

pleadings in suits removed from State courts, 281.

complaint or petition in actions in, 282.

form and sufficiency of answer to action in, 283.

general rules governing pleadings in, 284.

remedy for indefinite or uncertain pleading, 284.

remedy for duplicity in pleading in, 284.

remedy for irrelevancy, etc., in pleading, 284.

frivolous answer or defense may be stricken out, 284.

when demurrer will not lie to correct pleadings in, 284.

Federal courts — Continued.

- upon demurrer the whole record is presented, 284.
- pleadings in action for infringement of patent, 283.
- Forcible entry and detainer**, is a statutory proceeding, 146.
 - strict compliance with statute required, 146.
 - what complaint in action for, should contain, 146.
 - description of land in proceeding, 146.
 - avowment of possession, 146.
 - allegation of unlawfulness of entry, 146.
 - when gist of action, 146.
 - answer to proceeding, 146.
- Foreclosure**, of mortgage, complaint in, 144.
 - mortgage, note or bond to be made part of complaint, 144.
 - allegation of execution of mortgage, 144.
 - setting out mortgage in complaint in, 144.
 - defect in complaint for, cured by verdict, 144.
 - when record of mortgage need not be averred, 144.
 - statement of interest of co-defendant, 144.
 - interests of infants, allegations as to, 144.
 - allegation as to mortgage debt, 144.
 - allegation of default in performance of condition, 144.
 - averring assignment of note and mortgage, 144.
 - when demand need not be shown, 144.
 - complaint in, against administrator, 144.
 - asking for judgment for deficiency in, 144.
 - complaint in action to redeem lands sold under, 144.
 - of chattel mortgage, complaint in, 144.
 - of mechanic's lien, complaint in, 144.
 - sufficiency of answer in, 145.
 - defenses in action for, 145.
 - failure of consideration of mortgage, 145.
 - mistake in drawing mortgage, 145.
 - fraud in assignment of mortgage, 145.
 - want of consideration as a defense, 145.
 - defenses existing between original parties, 145.
 - decree of, under prayer for general relief, 193.
 - of tax certificate, 206.
- Fraud**, facts constituting, to be set forth in pleading, 20, 67, 147, 148.
 - is found only when facts make it apparent, 147.
 - ultimate fact only need be pleaded, 147.
 - when, need not be directly alleged, 147.
 - allegation of, in alternative, 20, 147.

BOONE PLEAD. — 47.

Fraud — Continued.

- what complaint in action for, must show, § 147.
- as ground for setting aside conveyance, 149, 194.
- must be specially pleaded in answer, 148.
- when answer in action for, not sufficient, 148.
- allegations of, in petition for injunction, 153.
- as ground for reformation of instrument, 193.
- not available without an injury, 210.
- general charge of, is a legal conclusion, 20.
- when facts constituting, need not be directly alleged, 20.
- complaint must show connection of, with alleged damage, 20.
- cannot be sustained in defense under general denial, 67.
- mistake cannot be proved under averment of, 170.
- knowledge of, does not estop party from setting up, 170.

Fraudulent conveyances, complaint in action to set aside, 149.

- what constitutes, 149.
- averment of no other property, 149.
- averment of execution issued unsatisfied, 149.
- averment of discovery of fraud, 149.
- averment of claim reduced to judgment, 149.
- answer to action to set aside, 149.
- conveyance of homestead not fraudulent, 149, n. 11.

Frauds, statute of, may generally be relied upon under general denial, 68.

- when to be specially pleaded, 68.
- when pleaded facts should be set forth, 68.

General denial, what is meant by, 60.

- not permitted in same allegation with specific, 60.
- common form of, 60, 61.
- faulty forms of, 61, 62.
- in conjunctive form is insufficient, 61.
- if argumentative is seldom good, 61.
- must be direct and unequivocal, 61.
- in the alternative is bad, 61.
- upon information and belief, 62.
- what may or may not be subject of, 63.
- material allegation not subject of, taken as true, 64.
- what may be shown under, 65.
- what may not be shown under, 65.

- Goods sold and delivered, sufficiency of complaint in**
 - action for, § 150.
 - facts only need be stated in complaint, 150.
 - when complaint is insufficient, 150.
 - description of quantity of goods sold, 150.
 - non-payment need not be alleged in complaint, 150.
 - allegations as to sale, 150.
 - what may be alleged in answer, 150.
 - sufficiency of denial in answer, 150.
 - denial of indebtedness not sufficient, 150.
- Guaranty, complaint in action on, 151.**
 - when not within statute of frauds, 151.
 - allegation of notice of acceptance of offer of, 151.
 - conditional, pleading in action on, 151.
 - allegation of due diligence in prosecuting suit against original contractor, 151.
- Husband and wife, right of wife to sue. 152.**
 - joinder of, in actions, 152.
 - allegation of coverture, 152.
 - action by wife for injury to person, 152.
 - allegation as to separate property of wife, 152.
 - action on note given by wife, 152.
 - defense to action on note given by wife, 152.
 - complaint on bond given by wife, 152.
 - complaint on contract by wife, 152.
 - complaint against wife as sole trader, 152.
 - complaint against husband for goods furnished wife, 152.
 - answer to action brought by wife, 152.
 - action by husband for enticing away wife, 197.
- Inducement, facts by way of, should be pleaded, 28.**
 - matters of, not subject of denial, 63.
 - matter of, precedes statement of cause of action, 35.
 - necessity of, in action for libel or slander, 163.
- Injunction, what complaint for, must show, 153.**
 - allegation of irreparable injury, 153.
 - allegation of title in complaint, 153.
 - to prevent wrongful collection of tolls, 153.
 - to prevent prosecution of pending suit, 153.
 - to restrain collecting of taxes, 153.
 - when petition for, dissolved, 153.
 - to restrain threatened waste, 211.
- Innkeeper, obligation of, imposed by law, 154.**
 - degree of care required of, 154.
 - allegations in complaint against, 154.

Innkeeper — Continued.

who deemed a guest, § 154.
demand and negligence need not be averred, 154.
action by, to enforce lien on baggage, etc., 154.

Insurance, complaint on policy of, must aver insurable interest, 155, 156, 213.

insurable interest presumed to continue, 155.
character of interest need not be specified, 155.
what allegation of insurable interest sufficient, 155.

averment of loss from fire, 155.

recovery of partial loss under averment of, total loss, 155.

allegation of compliance with conditions, 155, 157.
averment as to truth of representations in policy, 155.

life, complaint on policy of, 156.

allegations as to death of assured, 156.

complaint need not anticipate defense, 156.

when burden of proof on defendant, 156.

waiver of provision in policy of, 156.

statement of consideration for policy, 156.

statement of proposals, answers, etc., in complaint, 156.

marine, complaint in action on policy of, 157.

marine, open policy, complaint on, 157.

answer to action on policy of, 153.

averment of breaches of condition in answer, 158.

setting up increase of risk in answer, 158.

answer setting up false statement in application for, 158.

what defenses to be specially pleaded, 158.

Interpleader, nature of, remedy by, 159.

in what cases maintainable, 159.

what complaint must aver, 159.

complaint must offer to bring money or thing into court, 159.

demurrer to complaint in action of, 159.

Intervention, what right of, rests on, 159 a.

right of, provided by statute, 159 a.

when it takes place, 159 a.

what entitles person to, 159 a.

pleadings in, 159 a.

what must be shown in complaint, 159 a.

when demurrer lies to complaint for, 159 a.

Intervention — Continued.

when motion to dismiss complaint is proper, § 159 *a*.
in attachment suit, what complaint must show,
159 *a*.

order striking petition for, from files, 159 *a*.

Irrelevancy, what comprehended in term, 249.

matter may be stricken out for, 249.

what matter will not be stricken out for, 249.

when motion to strike out should be made, 249.

motion should point out parts objected to, 249, n. 19.

Joinder of actions. See MISJOINDER.

general rule as to, 37.

of legal or equitable causes of, 37.

ex contractu and *ex delicto*, 37.

causes of, must be consistent with each other, 37.

must affect same parties, 37.

must not require different places of trial, 37.

false imprisonment and malicious prosecution, 37.

assault and battery and false imprisonment, 37.

slander, libel, and malicious prosecution, 37.

trespass to person and to property, 37.

on contract, and for fraud or negligence, 37.

for injury to animal and for conversion of animal, 37.

for recovery of real property, and for value of rents and profits, 37.

for partition of real and personal property, 37.

qui tam or popular actions, 37.

rule as to consistency required, 37.

Joinder of defenses, defendant may join as many as he may have, 78.

in verified answer, rule as to, 78.

denial not waived by setting up new matter, 78.

in action on note, 78.

denial and justification, 78.

denial and statute of limitations, 78.

defense on merits and former suit pending, 78.

in action for breach of contract of sale, 78.

in action of trespass, 78.

in answer of surety on note, 78.

what defenses may not be joined, 78.

Judgment, how pleaded, 11, 30, 160.

sufficiency of allegations in pleading, 30, 160.

foreign, how pleaded, 30, 160.

record of, how pleaded in answer, 67.

Judgment — Continued.

- pleading jurisdiction of court rendering, §§ 160, 161.
- complaint in action on, 160.
- complaint in action by assignee of, 160.
- averment of assignment of, 160.
- of justice of peace, action on, 160.
- complaint in action to set aside, 160.
- must be pleaded in bar, in answer, 161.
- what will bar action on, 161.
- fraud as defense to action on, 161.
- what general denial puts in issue in action on, 161.
- what may be shown under general denial to action on, 161.
- pleading vacation of, in answer, 161.

Judicial notice, matters within, not to be alleged, 12.

- what matters are judicially noticed, 12, 29.
- what matters not judicially noticed, 12, 29.
- of ordinance of city, 29.
- of charters or laws incorporating cities, 172.
- of abbreviations in pleading, 278.

Jurisdiction, question of, raised by demurrer or answer, 47.

- when want of, objected to by demurrer, 47.
- when want of, objected to by answer, 47.
- waiver of objection to want of, 259.
- what is not a waiver of objection to want of, 259.

Justification, nature of defense of, 72.

- must be specially pleaded, 72, 208.
- particulars must be alleged, 72.
- in action for libel or slander, 72, 164.
- may be united with general denial in answer, 72.
- matter in, as act of officer, 177.
- plea of, in action against sheriff, 199.
- on ground of official duty, 208.
- matter of, in defense of trespass, 208.
- of entry upon land for mining purposes, 73.

Justice of peace, assertion of right under judgment of, 160.

- nothing presumed in favor of jurisdiction of, 160.
- advice of, as defense in malicious prosecution, 168.

Landlord and tenant, relation of, supports action for use and occupation, 162.

- complaint in action for use and occupation, 132.
- action to recover rent reserved, 162.
- proof of tenancy under lease 162.

Landlord and tenant — *Continued.*

- ownership of leased premises presumed to continue, § 162.
- what necessary to sustain action for use and occupation, 162.
- pleading eviction by lessor, 162.
- when eviction no defense to claim for rent, 162.
- Libel and slander**, complaint in action for, 163.
 - inducement and innuendoes not dispensed with, 163.
 - when extrinsic facts to be alleged, 163.
 - when extrinsic averment not necessary, 163.
 - office of innuendo, 163.
 - publication must be averred, 163.
 - import of word "published," 163.
 - words implying presence of hearers, 163.
 - averment importing publication, 163.
 - averments relating to newspaper, 163.
 - precise words published to be set forth, 163.
 - words published in foreign language, 163.
 - words to be understood by those who hear them, 163.
 - allegation of malicious publication, 163.
 - averment of provincial meaning of words, 163.
 - allegation of special damages, 163.
 - defenses in actions of, 164.
 - denial of publication, 164.
 - alleging facts excusing publication, 164.
 - justification to be specially averred, 164.
 - pleading matters in mitigation, 164.
 - what amounts to justification, 164.
 - truth in justification bars action for, 164.
 - answer must set out facts fully, 164.
 - justification must be as broad as charge, 164.
 - insufficient answers in actions for, 164.
 - pleading privilege in defense, 164.
 - denial of slanderous intent, 164.
- License**, must be specially pleaded, 73.
 - as a defense in action of trespass, 73.
 - pleading justification of entry upon land for mining purposes, 73.
 - may be joined with denial of title, 78.
- Limitations, statute of**, must be directly pleaded, 69.
 - cannot be shown under general denial, 69.
 - not generally available on demurrer, 69.

Limitations, statute of — Continued.

particular statute of, how pleaded, § 69.

of other State or country no defense, 69.

may be joined with denial in answer, 78.

Loss of service, is gist of action for seduction, 197.

sufficient allegation of, 197.

slight proof of service required, 197, n. 3.

Lost pleadings, authority to file others instead of, 257.

place of, supplied by motion, 257.

affidavits or certificates as to, 257.

finding of original, after substitute filed, 257.

Malice, allegation of, in action for libel or slander, 163.

as ingredient in action for malicious prosecution, 167.

facts showing absence of, allegation of, 168.

Malicious prosecution, what complaint in action for, must aver, 167.

avermment of want of probable cause, 167.

avermment of termination of suit, 167.

when suit is deemed terminated, 167.

what constitutes proof of probable cause, 167.

special damages to be specially averred, 167.

items of special damage, 167.

distinguished from abuse of legal process, 167.

joinder of, with cause for false imprisonment, 37, 167.

when action for, will not lie, 167.

what defendant may allege in mitigation, 168.

evidence of probable cause under general denial, 168.

advice of counsel as defense of action for, 168.

what essential to defense to action for, 168.

Malpractice. See PHYSICIAN AND SURGEON.

allegations in complaint in case of, 182.

liability in case of, on what founded, 182.

remedy for uncertainty in allegations in case of, 182.

damages in action for, by husband, 182, n. 11.

Mandamus, nature of remedy, 168 a.

is applied for protection of civil rights, 168 a.

what interest relator must show in order to maintain, 168 a.

performance of condition precedent to be shown, 168 a.

what constitute the pleadings in, 168 a.

what facts relator should set forth, 168 a.

alternative writ of, constitutes complaint, 168 a.

motion to quash, equivalent to demurrer, 168 a.

Mandamus — *Continued.*

pleadings in, how construed, § 168 *a.* *
 sufficiency of plea in proceeding by, 168 *a.*
 amendment of pleadings in, 168 *a.*

Master and servant, how the relation is alleged, 169.
 allegation of notice in action by servant, 169.
 pleading master's knowledge of defects, 169.
 master not liable for negligence of fellow-servant, 169.

sufficiency of complaint for master's negligence, 169.
 proof of negligence of master, 169.
 action for breach of contract of hiring, 169.
 averment of relation of, in action for seduction, 197.

Mechanic's lien, suit to enforce, is one in equity, 165.
 what complaint or petition must set forth, 144, 165.
 compliance with statute must be shown, 165.
 no suit lies until debt is payable, 165.
 complaint must state something due, 165.
 complaint must aver a contract, 165.
 correction of errors in complaint, 165.
 averment of filing of lien, 165.
 description of property in complaint, 165.
 averment as to furnishing materials, 165.
 defects in complaint cured by verdict, 165.
 example of variance not fatal, 165.
 defense of liens prior to plaintiff's, 166.
 counter-claim in defense of action to enforce, 166.
 denial of demand and refusal to pay, 166.**Misnomer**, pleaded in abatement at common law, 255.
 waived by plea to merits, 255.
 how alleged in pleading, 255.
 generally corrected by amendment under Codes, 255.
 waiver of, by appearance and filing answer, 255.
 of corporation in pleading, 255.
 in objecting to, defendant must disclose true name, 255.

will not be regarded on appeal, 255, n. 5.
 must be pleaded to avail in defense, 67.

Mistake, in date, when not material, 170.

how alleged in pleading, 170.
 insufficient averment of, 170.
 as ground for reformation of instrument, 170, 193.
 proof of, must be clear, 170.
 cannot be proved under averment of fraud, 170.
 burden of proof in case of, 170.

- Misjoinder**, of causes of action as ground of demurrer, § 52.
union of what causes of action amount to, 37.
design of demurrer on ground of, 52.
when complaint not demurrable on ground of, 52.
what demurrer should specify in case of, 52.
test by which determined, 52.
of parties, what is meant by, 50.
of parties, when assailable by demurrer, 50.
of parties defendant, remedy, 50.
- Mitigation**, evidence in, under general denial, 76.
when matter in, must be set up in answer, 76, 164.
matter of, in action for breach of promise, 130.
- Money had and received**, etc., when action for, may be maintained, 171.
law raises promise on part of receiver to pay, 171.
form of complaint in action for, 171.
sufficiency of allegation in complaint for, 171.
complaint may set forth special circumstances, 171.
allegation of request or demand, 171.
example of insufficient allegation in complaint, 171.
by agent or attorney, cause of action for, 171.
all equitable defenses available to action for, 171.
what essential to sustain the action, 171.
no recovery when voluntarily paid for another, 171.
sufficient allegation of compulsory payment, 171.
recovery on ground of failure of consideration, 171.
recovery of money lost at play, 171.
answer in action for money loaned, 171.
what proof does not sustain complaint for, 171.
action for, lies against town, 172.
- Mortgage**. See FORECLOSURE, REDEMPTION.
- Motion**, is an application for an order, 244.
remedy by, for defects in pleading, 243, 244.
to make pleading more definite and certain, 244, 246, 269, 284.
to strike out irrelevant, redundant, or scandalous matter, 244, 249, 250, 284.
what indefiniteness in pleading relieved on, 244.
must point out defect with certainty, 245, 246.
instances of, sustained for uncertainty, 247.
at what time, made for indefiniteness, 248.
surplusage may be stricken out on, 249.
to strike out irrelevant matter, when made, 249.
correction of multifariousness by, 251.
remedy by, for inconsistency, 251, 269.

Motion — Continued.

- as a remedy for sham pleading, § 252.
- to strike out frivolous pleading, 253, 254.
- to strike pleading from files, 256.
- to strike out pleading for want of subscription or verification, 281.
- to strike out complaint for misjoinder of actions, 265.
- to compel plaintiff to elect between causes of action, 265.
- to compel causes of action to be separately stated, 266.
- objection to duplicity in pleading reached by, 284.
- Municipal corporation**, how described in pleading, 81, 172.
- incorporation of city judicially noticed, 172.
- when corporate character must be pleaded and proved, 172.
- sufficiency of complaint against, 172.
- complaint against village for defective sidewalk, 172.
- sufficient designation of plaintiff as, 172.
- power of, over streets need not be alleged, 172.
- avermment of notice of defect in street, 172.
- avermments in complaint against county, 172, 174.
- allegation of raising grade by city, 172.
- pleading substance of ordinance of, 172.
- instances of sufficient averments, 172.
- liability of, for torts, 172, 174.
- ground of liability to be set out in pleading, 172.
- complaint against, for trespass, 172.
- action for money had and received lies against, 172.
- complaint against, for money paid, laid out, and expended, 172.
- complaint against, on contract for building bridge, 172.
- defenses to actions against, 173.
- answer of, no claim properly presented, 173.
- answer by officers of, 173.
- plea of *non est factum* to action on contract by, 173.
- verification of plea by officers of, 173.
- actions against, for negligence, 174.
- Name**, of action not material under Codes, 8.
- of court and county to be specified in complaint, 7, 8.
- of county omitted from complaint, remedy, 8.
- of parties must be inserted in complaint, 9.
- if set out in caption need not be repeated in body of complaint, 9.

Name—Continued.

- by which defendant may be sued, §§ 9, 255.
- middle, not recognized in law, 9, 255.
- word "junior" no part of, 9, 255.
- words of description added to, 9.
- of State, how set out in pleading, 9.
- of city in foreign state not judicially noticed, 12.
- Negative pregnant**, meaning of term in pleading, 61.
- Negligence**, how averred in complaint in action for, 174.
- sufficient to state facts showing, 174.
- remedy for defective averment of, 174.
- averment of, in action against corporation, 174.
- malice in actions for, not to be averred, 174.
- contributory, need not be negatived in complaint, 174.
- rules in different States as to averment of contributory, 174.
- averment of, in complaint against attorney, 174.
- averment of, in complaint against county, 174.
- action for, against town in New York, 174.
- actions for, against municipal corporations, 174.
- causing death, action for, 174.
- allegations of damages in actions for, 174.
- consisting in omission of duty, 174.
- contributory, may be proved under general denial, 74, 175.
- what is contributory, in legal sense, 175.
- not element in action for nuisance, 176.
- contributory, rule as to pleading in defense, 74.
- contributory, proof as to, 74.
- New matter**, what is, 66.
- instances of defenses consisting of, 66, 67.
- must be distinctly set up in answer, 59, 66.
- evidence of, not admissible unless pleaded, 63.
- occurring after suit brought may be set up, 63.
- Notice**, general rule of pleading as to averment of, 23.
- when gist of action must be specially averred, 23.
- pleading facts excusing, 23.
- evidence of facts excusing, 23, 123.
- of dishonor of note, allegation of, 123.
- of existence of nuisance, allegation of, 176.
- Nuisance**, when individual may sue for relief against, 176.
- what complaint in action for, must state, 176.
- must be particularly described in complaint, 176.

Nuisance—Continued.

- sufficient to specify main fact, § 176.
- averment of notice or knowledge of, 176.
- request to abate not necessary, 176.
- negligence not element of action for, 176.
- complaint should not anticipate defenses, 176.
- what may be set up in defense of action for, 176.
- allegation of special damage, 176.
- what recoverable under general allegation of damage, 176.
- license to be pleaded in defense, 176.
- action for damages and for abatement may be united, 176.

Officers, how designated in pleading, 177.

- action against trustees of school district, 177.
- action against city officials, 177.
- complaint against commissioners, 177.
- action against, to recover money illegally exacted, 177.
- action against, for trespass through deputy, 177.
- action upon bond given by deputy, 177.
- liability of sureties on bond of deputy, 177.
- complaint against town treasurer and sureties, 177.
- filing claims for allowance before county board, 177.
- complaint against, for misconduct, 177.
- matter charged, justified as act of, 177.

Ordinance, not judicially noticed, 29.

- how set forth in pleading, 29, 172.
- city court may judicially notice, 29.
- not judicially noticed by courts generally, 181.
- complaint in action for violation of, 181.
- exhibit or copy of, in pleading, 181.

Partnership, existence of, to be alleged in complaint, 32, 179.

- complaint in action upon notes payable to, 179.
- fact of, and not firm name is material, 179.
- averment of assignment of firm property, 179.
- complaint in action by partner against copartner, 179.
- complaint upon assigned account of, 179.
- complaint in action for dissolution of, 179.
- action by surviving partner, 179.
- liability of surviving partner to action, 179.
- when averment of demand not necessary, 179.
- complaint against partner for accounting, 179.

Partnership — Continued.

- when complaint for accounting not demurrable, § 179.
- how allegation of, put in issue, 180.
- when answer does not put in issue, 180.
- answers to actions on notes of, 180.
- answer by one partner, 180.
- answer that defendant was limited partner, 180.
- illegality in use of firm name as a defense, 180.
- irrelevant allegations in answer, 180.
- Partition**, what complaint in, must set forth, 178.
 - interests of all persons in premises to be stated, 178.
 - averment of unknown owners, 178.
 - allegation of, no other parties in interest, 178.
 - description of property in complaint, 178.
 - asking for account of rents, 178.
 - when complaint demurrable for want of parties, 178.
 - title of plaintiff may be controverted by answer, 178.
 - controverting title of other defendant, 178.
 - when answer in, is a nullity, 178.
 - want of allegation of possession objected to by demurrer or answer, 178.
 - same parties not joint owners, etc., how objected to, 178.
 - what is not ground of demurrer, 178.
 - statute of limitations in defense, 178.
 - estoppel *in pais* as a defense, 178.
 - plea by guardian in suit against infants, of personal property, jurisdiction in equity, 178.
 - of lands claimed under Mexican grant, 178.
- Partial defenses**, must be pleaded as such, 77.
 - rule as to, under New York Code, 77.
 - matter in mitigation regarded as, 77.
- Payment**, must be specially pleaded in defense, 67.
 - when provable under general denial, 67, 196.
 - may be joined with usury and extension of time as defenses, 78.
- Penalties**, complaint in action for, 181.
 - facts constituting offense to be specially pleaded, 181.
 - allegations as to time, place, or circumstance not dispensed with, 181.
 - complaint must state case within statute, 181.
 - statute to be referred to in pleading, 181.
 - for violation of excise law, action for, 181.
 - for violation of municipal ordinance, 37, 181.

Penalties—Continued.

- several, may be recovered in one suit, § 181.
- joinder of actions for recovery of, 37, 181.
- when averments of complaint taken as true, 181.
- when non-payment of, need not be averred in pleading, 191.

Performance, of condition, how averred, 22.

- tender of, when conditions mutual, 22.
- plea of, in answer to complaint on bond, 128.
- avermment of, in action for work and labor, 195.
- of covenants, allegation of, in answer, 196.
- of duties enjoined by statute, averment of, 205.
- when evidence of waiver of, not admissible, 222.

Physician and surgeon, action against, for malpractice, 182.

- avermment of employment of, 182.
- extent of implied liability of, 182.
- allegation of contract by, to perfect a cure, 182.
- allegation of want of ordinary care and skill, 182.
- liability for malpractice, on what based, 182.
- complaint need not state who employed defendant in action for malpractice, 182.

Place, of trial must be clearly stated in complaint, 8.
of trial stated determines where to make motion, 8, n. 4.**Pleading, definition and object of, 2, 214.**

- parts of, at common law, 3.
- order of, at common law, 3.
- declaration included in, 3.
- facts only to be stated in, 3.
- was formerly conducted orally, 3.
- in equity, features of, 4.
- nature of demurrer, 3, 4.
- facts only to be stated, 3, 4, 5.
- certainty and accuracy required in, 3, 4, 5.
- under Codes, features of, 5, 10.
- object of, is to form an issue, 2, 5.
- under Codes, parts of, 6.
- counts in, unknown under Code system of, 16.
- instrument for payment of money, 28.
- facts by way of inducement, 28.
- exhibit forms no part of, 27.
- verification of, 34.
- formal parts of, 35, 59.
- joinder of causes of action in, 37.

Pleading — *Continued.*

- supplemental, nature of, § 40.
- demurrer is, under Codes, 41.
- causes of action improperly united in, 52.
- demurrer to, complaint, 41-57.
- on part of defendant is demurrer or answer, 58.
- nature of answer as, 58.
- requisites of answer in, 59.
- denials in, 60-65.
- new matter in defense, 66.
- must proceed on one definite theory, 214-272.
- allegations and proof must correspond in, 214.
- nature of variance in, 214.
- departure in, 105.
- system of, in England, changed by statute, 5, n. 11.
- amendments of, 225-242.
- remedies for formal defects in, 243-257.
- waiver of objections to, 258-271.
- construction of, 272-279.
- in federal courts, 281-284.

- Pledge**, complaint in action for conversion of, 182.
- when demand for, should be averred, 182.
- avertment of tender of amount due on, 182.
- avertments in action to redeem, 182.
- when statute of limitations begins to run against pledgor, 182.
- delay to claim redemption of, effect, 182.

- Positiveness**, relative to statement of facts required, 15.

- when rule as to, not violated, 15.

- Possession of land.** See EJECTMENT, TRESPASS.

- Prayer**, for relief or judgment in complaint, 33.
- different kinds of relief embraced in, 33.
- may be for alternative relief in some cases, 33.
- when answer concluding with, not a counter-claim, 84.
- answer contains only, when affirmative relief is sought, 59.

- Presumption**, of law not to be stated in pleading, 11.
- that judgment rendered remains in force, 11.
- of continuance of ownership once shown, 25.
- that note made by corporation was for a purpose within its corporate power, 123.
- in favor of a pleading, 273.

- Publication, averment of, in action for libel or slander,**
 § 163.
 what amounts to sufficient averment of, 163.
 of slanderous words in foreign language, 163.
 denial of, in action for libel or slander, 164.
- Puis darrien continuance, office of plea of, at common law,**
 53.
 supplemental answer takes place of, under Codes,
 53.
 wherein supplemental answer differs from, 53.
 motion to strike plea of, from files, 53.
- Qui tam action, union of causes for, in same complaint,**
 37, 181.
- Quieting title, nature of remedy authorized by the Codes,**
 186.
 who may bring the action, 186.
 action under California Code, 186.
 who may maintain the action in New York, 186.
 nature of adverse claim, 186.
 when plaintiff is entitled to remedy, 186.
 if remedy at law, action will not lie, 186.
 what complaint in action must allege, 186.
 when complaint is insufficient, 186.
 complaint to quiet title and set aside deed, 186.
 plaintiff cannot at option split suit into many, 186.
 cross-complaint in action for, 186.
 complaint or bill under Illinois practice, 186.
 issue formed by denial of plaintiff's possession, 187.
 plaintiff's possession admitted if not denied, 187.
 when defendant's answer is a nullity, 187.
 answer setting up specific title, 187.
 paramount right in third person, 187.
 pleading statute of limitations in defense, 187.
- Quo warranto, nature of remedy under Code system,**
 188.
 remedy by action substituted for, 188.
 action of, determines title to office, 188.
 when the action lies, 188.
 what complaint should allege, 188.
- Railroads, liability of company for killing stock, 189.**
 allegation as to fencing track, 189.
 what proof sustains allegation that road was un-
 fenced, 189.
 complaint against, for killing stock, 189.
 complaint against, for trespass, 207.

- Receiver**, pleading appointment of, § 190.
cannot sue or be sued without leave of court, 190.
in whose name to sue, 190.
averment of leave to bring action by or against, 190.
denial of appointment or qualification in answer, 190.
- Recognizance**, in whose name action is brought on, 191.
what complaint on, should contain, 191.
what complaint on, need not set out, 191.
insufficiency of complaint in action on, 191.
- Redemption**, of mortgaged premises, what complaint must show, 192.
parties to suit for, 192.
averment of readiness to pay what is due, 192.
demand of accounting in suit for, 192.
when complaint states good cause of action, 192.
of pledge, averment of tender, 183.
- Redundancy**, meaning of term, 250.
in pleading, remedy for, 250.
- Referee**, takes the place of the court, 238.
power of, to allow amendments, 238.
restrictions on power of, as to amendments, 238.
power of, as to amendments limited in California, 238.
discretion of, as to amendment of pleadings, 239.
- Reformation**, of instrument, grounds for, 193.
in cases of mistake, 193.
in cases of fraud, 193.
for mistake and fraud, 193.
complaint must clearly point out mistake, 193, 213.
mutuality of mistake to be shown, 193.
sufficiency of complaint in action for, 193.
relief on ground of fraud, 193.
proof of mistake will not support complaint for fraud, 193.
for mistake in description in conveyance, 193.
of contract and recovery on, in same action, 193.
of pleading, when action not maintainable for, 193.
- Removal of cause**, from State to federal court, 282.
pleadings after, 281, 282.
- Replevin**. See CLAIM AND DELIVERY.
- Reply**, nature of the pleading, 103.
not permitted under a few of the Codes, 103.
when necessary or allowable generally, 103.
when not required, 103, 106, 108.

Reply — Continued.

- effect of failure to put in, § 103.
- form of, 103.
- to new matter generally, 103.
- to new matter constituting counter-claim, 104.
- must be distinct and specific, 104.
- must not set out new cause of action, 104.
- faulty complaint not cured by, 104.
- when bad or insufficient, 104, 105.
- when faulty because of departure, 105.
- to statute of limitations, 106.
- to answer of discharge in bankruptcy, 106.
- to counter-charges of adultery, 106.
- when directed by order of court, 106.
- when want of, is deemed waived, 107.
- proceeding when none required, 108.
- grounds of demurrer to, 109.
- may be stricken out for departure, 109.
- demurrer to, reaches cross-petition, 112.
- if bad, is good enough to insufficient answer, 112.
- Rescission**, of contract, if claimed, must appear by complaint, 194.
- averment of restoration of, or offer to restore consideration, 194, 210.
- when allegation of tender back of consideration not necessary, 194.
- of contract made with lunatic, averments, 194.
- of contract for sale of goods, averments, 194.
- of contract to sell land, averments, 194.
- of contract on ground of fraud, 194, 210.
- Scienter**, when necessary to be alleged and proved, 24.
- when, need not be alleged, 24.
- how alleged, 24.
- Seal**, conclusive evidence of consideration at common law, 128.
- action upon instrument under, no consideration need be alleged, 19.
- rebuttal of presumption of consideration arising from, 128.
- action on instrument under, plea of *non est factum*, 213.
- Seduction**, gist of action for, at common law, 197.
- averment of loss of service, 197.
- averment of relation of master and servant, 197.
- averment of fact of, 197.

Seduction — *Continued.*

damages and averment of, § 197.
of wife, action by husband, 197.
action for, by unmarried female, 197.
complaint in action for, by unmarried female, 197.
damages recoverable by unmarried female, 197.
when complaint for, bad on demurrer, 197.
when action for, barred by statute of limitations,
197.

evidence in action for, 197, notes 3, 8.

Services, complaint in action to recover for, 195.

count upon implied assumpsit, 195.
when special agreement should be set out, 195.
averment of performance of conditions precedent,
195.

amendment of complaint in action for, 195.
rendition of, under void contract, recovery for, 195.
insufficiency of pleadings in actions for, 195.
complaint in form upon *quantum meruit*, 195, 196.
what defendant may show under general denial,
196.

defenses to actions for value of, 196.

want of skill as a defense, 196.

affirmative defense must be pleaded, 196.

what cannot be shown under general denial, 196.

of broker, defense to action for, 196.

illegal, no recovery for, 196.

when answer in action for, not frivolous, 196.

rendered by minor, recovery for, 196.

complaint on special contract for, 196.

attorney's action for, general denial, 196, n. 3.

loss of, is gist of action for seduction at common
law, 197.

sufficient allegation of loss of, 197.

damages for prospective loss of, 197.

allegation of employment by county to render,
122.

counter-claim in action for, 90.

Set-off. See COUNTER-CLAIM.

comprehended in counter-claim under some Codes,
85, 88.

provided for, in addition to counter-claim in some
States, 85, 88.

what demands may be subject of, 85.

claim barred by limitation not available as, 88.

- Sheriff**, how official character shown in complaint, § 198.
action against, on personal liability, 198.
complaint in action against, for escape, 198.
complaint for not executing process, 198.
complaint for failure to return execution, 198.
complaint in action on bond of, 198.
complaint in action for trespass by, 198.
defenses to actions against, 199.
plea of waiver to action against, 199.
justification must be specially pleaded, 199.
defense to action against, for false return, 199.
- Slander of title.** See LIBEL AND SLANDER.
nature of action for, 200.
plaintiff must show title or interest, 200.
special damages must be alleged, 200.
avermment of malice and want of probable cause, 200.
allegations as to loss of purchaser, 200.
pleading defense of title in defendant, 200.
what will not sustain action for, 200.
- Specific performance**, action for, what complaint must allege, 201.
contract must be fully set out, 201.
allegation of contract made by agent, 201.
offer of, performance by plaintiff, 201.
allegation of repudiation of contract by defendant, 201.
of oral agreement, complaint to enforce, 201.
part performance, delivery of possession, etc., 201.
of covenant of, renewal, 201.
award of damages in lieu of, 201.
complaint against heirs of deceased vendor for, 201.
rescission of contract in suit for, 201, n. 15.
answer to action for setting up different contract, 202.
defense that subject of contract was homestead, 202.
when answer raises sufficient issue, 202.
when complaint for, will be dismissed, 202, n. 5.
- State**, what comprehended in the word, 9.
how designated in complaint in action by, 9.
judicial notice of public laws of, 12.
geographical features of, judicially noticed, 12.
- Statute**, public, judicially noticed, 29.
public, need not be pleaded, 29.
private, must be specially pleaded, 29.
private, how pleaded, 29.
when words of, followed in pleading, 29.

Statute—Continued.

- foreign, to be pleaded as other fact, § 29.
- of frauds as a defense, 68.
- of limitations, how pleaded, 69.
- how pleaded in defense, generally, 70.
- allowing counter-claims is liberally construed, 87.

Subscriptions, assessments on, when enforceable, 203.

- complaint in action on contract of, 203.
- to stock, what complaint must show in action on, 203.
- action on, unconditional promise to pay, 203.
- complaint in action to recover part, 203.
- with condition attached, action on, 203.
- performance of condition, averment of notice of, 203.
- complaint in action on bonds issued to pay, 203.
- to railroad stock, complaint in action on, 203.
- suit on, by corporation, 203.
- complaint in action on unpaid assessments, 203.

Suit, meaning of term, 1.

- includes an action, 1.
- in equity, as distinguished from action at law, 4.
- pleadings allowed in, under Codes, 6.
- nature of pleadings in, under Codes, 5.
- to enforce mechanic's lien, 165.
- for an accounting, 121, 179.
- to foreclose mortgage, 144.
- to redeem from a mortgage, 192.
- for reformation of instrument, 193.
- for rescission and cancellation, 194.
- by and against receiver, 190.
- for partition of lands, 178.
- by and against partners, 179, 180.

Supplemental pleadings, complaint, when allowed, 40.

- complaint, office of, 40.
- allowed in discretion of court, 40, 83.
- what rules govern, 40.
- complaint, instances of, allowed, 40.
- in action for divorce, 40, n. 17.
- answer, what may be set up by, 83.
- answer not a waiver of defenses previously interposed, 83.
- scope of, in general, 83.
- answer, instances of, not allowed, 83.

Surety, entitled to contribution from co-surety, 204.

- complaint by, in suit for contribution, 204.
- what complaint for contribution should show, 204.

Surety — *Continued.*

- when right of action for contribution accrues, § 204.
- allegation of payment of debt, 204.
- upon official bond, action against, 204.
- demand to fix liability of, 204, n. 7.
- discharge of, by extension of time, 205.
- extension of time to be specially pleaded, 205.
- sufficient allegation of fact of extension of time, 205.
- delay of creditor to proceed against principal, 205.
- allegation of fact of notice to maker, 205.
- defense to action on undertaking by, 205.
- may plead usury as defense to promissory note, 205.
- may unite defenses of usury, extension of time, and payment, 205.
- pleading facts rebutting presumed equity to contribute, 205.
- amendment of answer by, after verdict, 205.

Surplusage, what is comprehended in term, 249.

- will not in general vitiate a pleading, 249.
- may be disregarded or stricken out, 249.
- not a subject for demurrer, 249.
- when motion to strike out should be made, 249.

Taxes, what complaint to enforce collection of, must allege, 206.

- suit to recover back, when paid under protest, 206.
- complaint to recover back, payment under void assessment, 206.
- complaint to enjoin collection of, 206.
- improper joinder of causes of action in complaint, 206.
- delinquent, complaint in action to recover, 206.
- complaint to enforce ditch assessment, 206.
- complaint to foreclose tax certificate, 206.
- complaint in action by tax payers to prevent waste, etc., under New York statute, 206.
- complaint to remove assessment as cloud on title, 206.
- description of personalty in assessments, 206, n. 7.
- avement of tax "duly levied," construction of, 206, n. 15.
- complaint against city to recover back, 206.
- pleading remission of, by board of supervisors, 206.
- lien of, as encumbrance on land, 210.

- Time**, if material should be alleged, § 13.
when deemed material, 13.
when material, should be alleged with precision, 13.
allegations of, how construed, 13, 279.
presumed to refer to commencement of action, 279.
of commencing suit need not be stated in complaint, 35.
of execution of note, allegation of, 123.
- Title or ownership**, how alleged in pleading, 25.
of note in suit, how alleged, 25, 28.
facts pleaded control general allegation of, 25.
once shown is presumed to continue, 25.
in action by assignee, allegation of, 25.
allegation of, in action to set aside deed, 194.
allegation of, in action for trespass, 207, 208.
- Torts**, not available as counter-claim in action on contract, 89.
in actions for, what available as counter-claim, 89.
joinder of causes of action for, 37.
waiver of, and suit on contract, 39, 136.
amendment striking out waiver of, 233.
- Trespass**, to land, what complaint for, must allege, 207.
allegation of title or possession in plaintiff, 207.
when recovery limited to injuries to land, 207.
recovery for injuries to land and possession, 207.
description of lands entered on, 207.
allegation that injury was forcible not necessary, 207.
complaint for cutting and carrying away plaintiff's trees, 207.
by railroad company in laying tracks in public street, complaint in, 207.
sufficiency of complaint as to allegation of ownership in plaintiff, 207.
allegation as to treble damages in action for, 207.
recovery for unlawful carrying away, 207.
de bonis, etc., and *quare clausum*, etc., may be joined, 207.
inconsistent counts in complaint for, 207.
allegations going only to question of damages, 207.
when complaint fails to state cause of action, 207.
who cannot maintain, 207, n. 1.
what may be shown under general denial in answer to action of, 208.
what may not be shown under general denial, 208.
justification of entry by defendant, 208.

Trespass — Continued.

- plaintiff may benefit by defendant's admission in answer, § 208.
- insufficient traverse of allegation of possession, 208.
- when defendant has affirmative, to defeat plaintiff's title, 208.
- right of way in defense to be specially pleaded, 208.
- license must be specially pleaded in answer, 208.
- averring facts constituting license sufficient, 208.
- justification by claim of easement, 208.
- justification on ground of official duty, 208.
- matter in justification must be specially pleaded, 208.
- remedy for defect of parties plaintiff in action for, 51.

Trusts, complaints in cases of, 209.

- complaint must charge with reasonable certainty, 209.
- complaint in action to have trust declared, 209.
- complaint need not state conclusion from facts alleged, 209.
- complaint to enforce resulting trust, 209.
- allegation of appointment of trustee, 209.
- joinder of counts in complaint in cases of, 209.
- complaint by *cestui que trust* to establish stale trust, 209, n. 5.

Undertaking. See BONDS.

- statutory, action on, 127.
- to procure release of property held by sheriff, action on, 127.
- on appeal, action on, 127.
- action on, averment of delivery of, 127.
- answers in actions on, 128.

Unlawful detainer, complaint and answer in action for, 61.**Use and occupation, action for, founded upon contract, 162.**

- lies only when relation of landlord and tenant exists, 162.
- if possession is adverse action for, does not lie, 162.
- implied contract will sustain, 162.
- complaint in action for, 162.
- what may be proved under complaint for, 162.
- when action for, cannot be maintained, 162.
- actual continued occupation need not be shown, 162.
- what plaintiff must establish in action for, 162.
- eviction by lessor, how pleaded, 162.
- finding as to value of, as measure of damages in ejectment, 184.

- Usury**, must be specially pleaded in defense, § 67.
how set out in answer, 67.
allegation of, under laws of foreign state, 67.
facts to be proved substantially as alleged, 67.
may be joined with payment and extension of time as defenses, 78.
- Value or quantity**, extreme exactness not generally required in alleging, 14.
when averment of, is matter of form, 14.
when allegation of, material, 14, 76.
when strictness in alleging, required, 14, n. 2.
failure to allege cured by verdict, 136.
of property as measure of damages, 136.
estoppel to prove true value, 14.
- Variance**, what is meant by, in pleading, 214.
effect of, 214.
when to be deemed material, 215, 217.
questions of, how determined, 215.
if material, remedied only by amendment, 215.
should be objected to on trial, 215.
when not deemed material, 216.
if not material must be disregarded, 216, 224.
party objecting to, must show that he was misled, 216.
if immaterial, judgment not reversed on ground of, 216.
distinguished from failure of proof, 217.
instances of, not material, 218.
instances of, when fatal, 219.
in matters of description, 220.
in respect to joint or several liability, 221.
between proof and bill of particulars, 223.
between summons and complaint, 224.
between description of note and copy of, 123.
between proof and bill of particulars, 126.
- Vendor and purchaser**. See **RESCISSIO**.
complaint in action for damages for fraud in exchange of lands, 210.
complaint to rescind contract of sale for fraud, 210.
complaint to recover back purchase money, 210.
allegation of offer to repay consideration, 210, n. 7.
pleading defenses in actions for rescission, 210.
action by vendor to recover purchase money, 210.
defense by purchaser of defect of title, 210.
answer that land is encumbered by tax lien, 210.

Vendor and purchaser — Continued.

plea of failure of consideration, § 210.
suit to enforce vendor's lien, waiver of defense to,
210.

complaint by vendor, sufficiency of, 210.
answer by purchaser, insufficiency of, 210.
actions relative to vendor's lien, 210, n. 17.

Waiver, of objections to pleadings generally, 158-272.

of formal defects by pleading to merits, 258, 268,
271.

of want of jurisdiction over person by appearance,
259.

of want of jurisdiction over subject of action, 259.

of objection to omission to file complaint, 260.

of objection to want of subscription or verification,
261, 270.

of irregularities by pleading over or demurring,
259, 261, 270, 271.

of objection to want of capacity to sue, 262.

of objection of defect of parties, 263.

of objection to misjoinder of parties, 264.

of objection to complaint for misjoinder of actions,
265.

of objection that causes of action are not separately
stated, 266.

of objection that another action is pending, 267.

of objection to uncertainty in name of party, 268.

of objection to pleading for uncertainty, 269

of objections, instances of, 271.

when delay construed as amounting to, 261.

of demurrer by answering over, 46, 270.

of reply, 107.

of compliance with statutory provision in forcible
entry and detainer, 146.

as a defense must be specially pleaded, 222.

of error in refusing particular amendment to an-
swer, 242.

of defects unless pleaded in abatement, 41.

of objections by failure to demur, 45.

omission to demur when not, 45.

Waste, what complaint must allege in action for, 211.

complaint need not refer to statute giving treble
damages, 211.

complaint in action for, by reversioner, 211.

complaint in action to compel accounting for, 211.

Wasto—Continued.

- injunction in action for, § 211.
- action of, at common law, 211, n. 1.
- what does not amount to defense in action for, 211, n. 4.
- when cutting timber is not, 211, n. 4.

Wills, jurisdiction of action for construction of, 212.

- when action for construction of, not maintainable, 212.
- complaint in action to construe, 212.
- of personality, action to construe, 212.
- demurrer to complaint for construction of, 212.
- complaint in action to contest validity of, 212.
- copy of will cannot be used to supply missing averments, 212.
- what allegation of unsoundness of mind includes, 212.
- what included in allegation of "unduly executed," 212.
- what petition for probate of, must state, 222.

Words, how construed in pleadings, 11, 163, 276, 277.

- of different meanings, construction of, 277.
- abbreviations of, how construed, 278.
- of contract set forth in pleading, 26, 135.
- construction of word "acceptance," 277.
- construction of word "conversion," 277.
- construction of word "taking," 277.
- construction of word "indorsed," 277.
- construction of word "signed," 277.
- construction of word "as," 9, 277.
- construction of word "fulfilled," 277.
- construction of word "obligation," 277.
- "the State" and "the people of the State" are equivalent expressions, 9.
- "action" and "suit," meaning of, 1.
- "counter-claim," how construed, 84.

Written instrument, filing of, with pleading, 213.

- when cross-petition need not set out, 213.
- denial in answer that true copy is set forth, 213.
- if pleading founded on, must be filed with pleading, 213.
- reformation of, setting forth, 213.
- complaint in action to reform, 213.
- when it need not be made an exhibit, 213.
- policy of insurance, complaint on, 213.

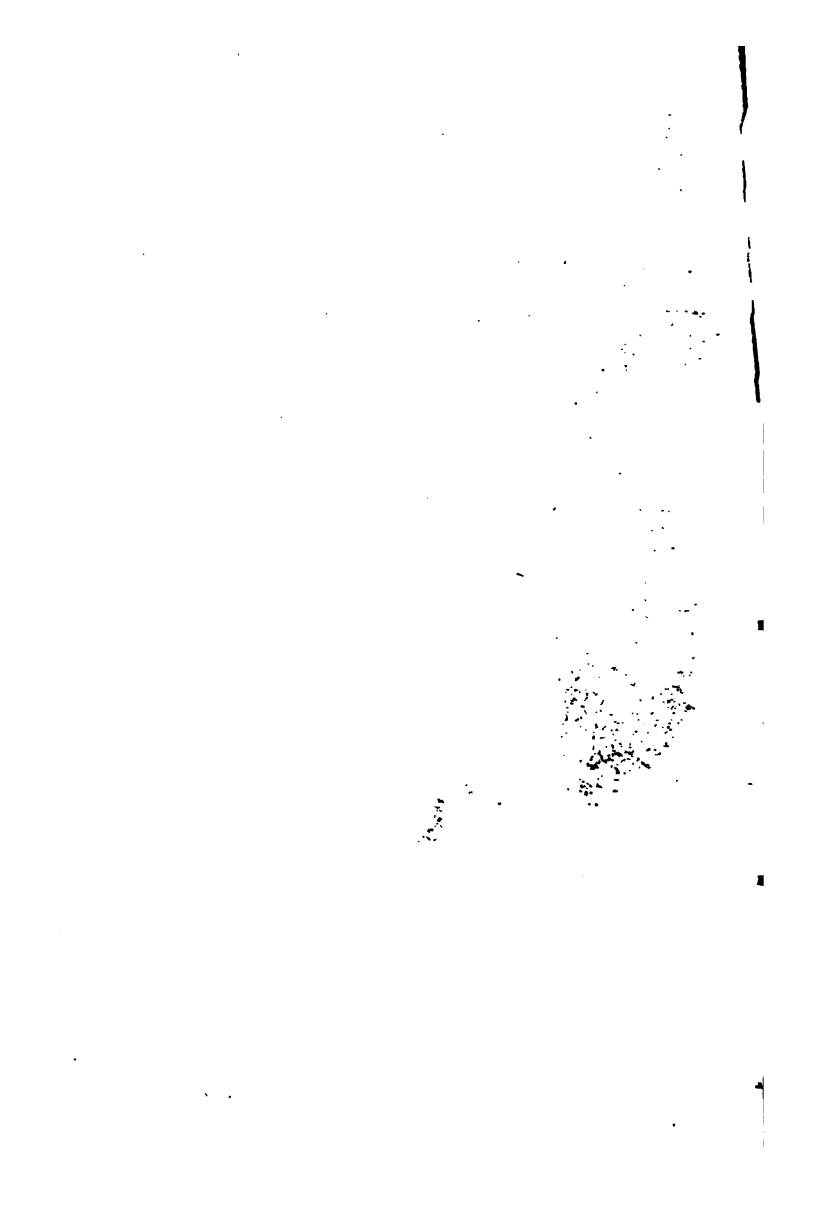
Written instrument— *Continued.*

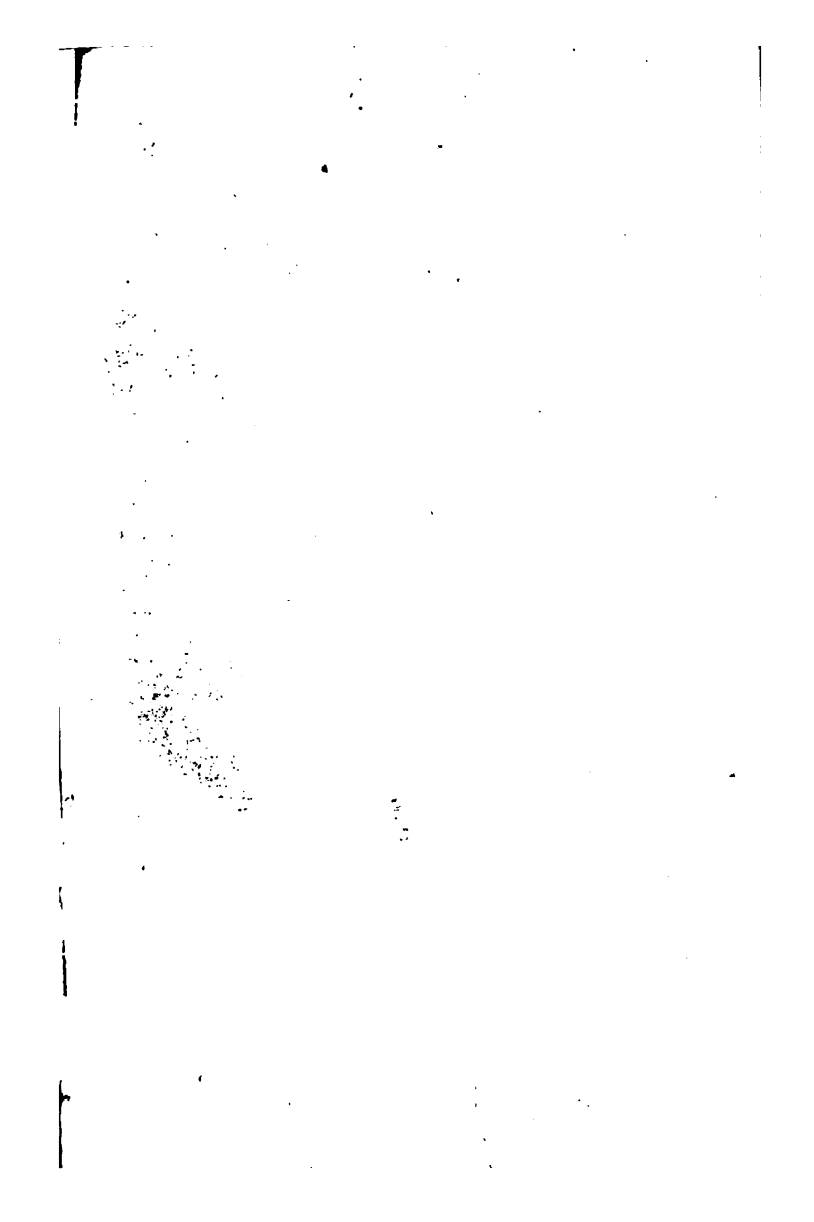
avowment of acceptance or delivery of, § 213.

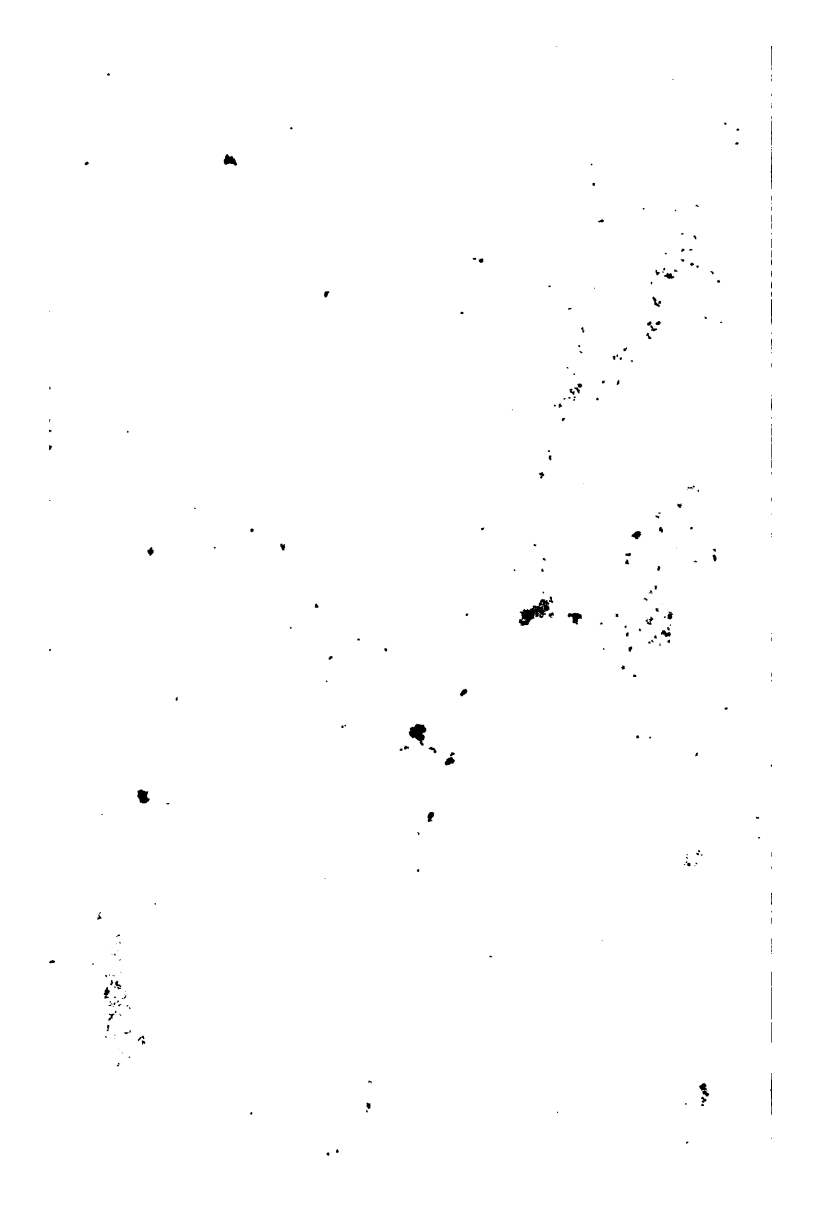
action on, allegation of consideration, 213.

plea of *non est factum* in action on, 213.

denial of genuineness of, when set up in answer,
213, n. 18.







BB ABC FRp
Pleading under the codes,
Stanford Law Library



3 6105 044 785 991